Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JAMES DRAIN et ux.,

Petitioners,

v.

ACCREDITED HOME LENDERS, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES DRAIN AND
RACHEL DRAIN, PRO SE
1012 Stanton Place
Clovis, N.M. 88101
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QUESTIONS PRESENTED

Petitioners, filed this civil action against Respondents, the mortgage Lenders, financial institution, a director and the servicing company under the Truth In Lending Act and other federal consumer protection laws in the United States District Court for the District of New Mexico in April 12, 2004, Complaining of Respondents withholding mortgage payment, unlawfully imposing insurance coverage on their home though they have proof home owners coverage is effective contrary to the stipulation in the disclosure statements and Imposing late fees and penalties as a result of the unlawful acts intentionally withholding mailed in payments several days past date when received thereby padding their bottom line at the expense of the home buyer. These charges were later investigated and confirmed by the FTC, and then Respondents moved to foreclose on property without honoring the FTC injunction order.

Respondents hired big law firms and refused to entertain any meaningful discussion to correct the errors as directed in the Federal Trade Commission order of May 2004. Shortly thereafter, the magistrate judge proceeded to enter orders, conduct hearings, and setting deadline for parties consent to magistrate jurisdiction.

Petitioners declined to give consent to magistrate jurisdiction. Without Petitioners consent to magistrate, the District Judge issued an order over

QUESTIONS PRESENTED – Continued

Petitioners objections conferring jurisdiction on magistrate on both dispositive and non-dispositive issues. The magistrate issued findings, memorandum and orders recommending among others, that Petitioners must release several years of their medical records without benefit versus privacy right consideration, that our case be dismissed and our lawyer fined $5,000.00 for arguing that we have a right to protection of our medical record and right to withhold consent from a magistrate.

Based on the magistrate findings, orders, memorandum opinion and recommendation which the District Judge adopted wholly and our case was dismissed with prejudice. We appealed to the United States Court of Appeals for the Tenth Circuit, The court affirmed the District Court blaming our lawyer without addressing the issue of jurisdiction and our privacy rights, in James Drain et al. v. Wells Fargo Bank et al., Tenth Circuit No. 06-2096.

Two questions are presented:

1. Whether the use of the U.S. Magistrate in the federal system to decide dispositive motions is appropriate under the Magistrate Act, though Petitioners did not consent to magistrate jurisdiction relying on the limitation language in the Magistrate Act, 28 U.S.C. § 636(a)(3); 28 U.S.C. § 636 (b)(1)(A) and (B); and whether the grant of jurisdiction by the District Judge to the magistrate on all

QUESTIONS PRESENTED – Continued

matters absent the consent of a party pursuant to Article III of the U.S. Constitution violates due process?

2. Whether a consumer suing under the Truth In Lending Act and the Federal Debt Collection Practices Act is entitled to First Amendment protection rights to privacy from an extensive and broad blanket request for disclosures of years of their medical history pursuant to a United States District Court for the District of New Mexico local rule, D.N.M.L.R., Rule 26.3(d)?

PARTIES TO THE PROCEEDING

The parties below are listed in the caption and are listed together with their attorneys address as follows:

1. James Drain and Rachel Drain (wife)

Plaintiffs

Mike Bello, Esq. 2508 N. Prince # 255 Clovis, N.M. 88101 (505) 769-3100.

2. Wells Fargo Bank, Minnesota, N.A. as Trustee for ITLA Mortgage, Loan Securitization 2002-1, LLC

Defendant

James J. Widland, Esq. and Dylan O'Reilly, Esq. Miller Stratvert P.A. P.O. Box 25687 Albuquerque, N.M. 87125 (505) 842-1950

3. Fairbanks Capital Corp., Utah

Defendant

James J. Widland, Esq. and Dylan O'Reilly, Esq. Miller Stratvert P.A. P.O. Box 25687 Albuquerque, N.M. 87125 (505) 842-1950

4. Basmajian T. Doyle, Director

Defendant

James J. Widland, Esq. and Dylan O'Reilly, Esq. Miller Stratvert P.A. P.O. Box 25687 Albuquerque, N.M. 87125 (505) 842-1950

5. Accredited Home Lenders Inc.,

Defendant

William F. Davis, Esq. and Cynthia Tessman, Esq., P.O. Box 6 Albuquerque, N.M. 87102.

CORPORATE DISCLOSURE STATEMENTS

The corporate disclosure statements are applicable to the Defendants-Respondents, since, they are corporations and a director. Plaintiffs-Petitioner are individuals and without corporate affiliation and not a corporate entity.

Respectfully Submitted

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OPINION BELOW

The opinion by the United States Court of Appeals for the Tenth Circuit, issued March 14, 2007, affirming the United States District Court decision, was marked unpublished. (App. 1). The circuit court affirmed the decision of the District Court (App. 11) which was a full adoption of the findings, proposal and recommendation of the magistrate judge without addressing the constitutional issues under magistrate jurisdiction and the first amendment protection rights. (App. 43) Petitioner moved for rehearing En Banc presenting the constitutional issues again and its relevance under consumer protection laws as well as the conflict under prior holding of this Court. The Petition for Rehearing En Banc was denied on May 3, 2007.

STATEMENT OF JURISDICTION

Pursuant to Supreme Court Rule 30.3 this Court has jurisdiction in that before the expiration of the 90 days after the Petition for Rehearing En Banc timely filed and denied May 3, 2007 (App. 77), and before August 1, 2007, Petitioners filed a timely Motion To Extend time, it was granted extending time from July 23, 2007 to and including September 28, 2007, and Petition was filed timely.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND RELEVANT PROVISIONS INVOLVED

This action was brought against the Respondent pursuant to the Federal Consumer Protection laws under the Truth In Lending Act 15 U.S.C. § 1692 and the Federal Debt Collection Practices Act 15 U.S.C. § 1692(k) in the federal court. It claims unlawful predatory lending practices and wrongful attempt to foreclose on our home without sufficient process to resolve discrepancies.

Relying on the provisions under Article III of the United States Constitution and the limitation to magistrate jurisdiction under the U.S. Magistrate Act Petitioner declined consent to magistrate jurisdiction pursuant to the limitation language under 28 U.S.C. § 636(a)(3) et seq. However, absent their consent the District Judge, by order granted jurisdiction to a magistrate judge on all matters over the objections under due process and Article III of the U.S. Constitution by the party.

The magistrate Pursuant to a local rule in the United States District Court for the District of New Mexico, D.N.M.L.R., Rule 26.3(d) (2004) Ordered broad disclosure of Petitioners medical record, bars them from obtaining relief on certain claims and recommended their suit be dismissed.

STATEMENT OF THE CASE

Petitioners filed this suit on April 12, 2004 by and through our attorney, Mr. Mike Bello, who represented us through the courts below. But he could not represent us here because the magistrate judge sanctioned him for arguing that we have the rights we are now asking this court to uphold. The Respondents in the case were the Defendants below, they are: 1) Wells Fargo Bank; 2) Fairbanks Capital Corp.; 3) Director of Fairbanks Capital, Mr. Basmajian Thomas Doyle and; 4) Accredited Home Lenders Inc., they were all served with process.

The Corporate Respondents were served through their attorneys as well as their agents of service. The Respondent Corporate Director, Mr. Thomas Doyle Basmajian was served through its corporate address as well as through its attorneys.

The Proof of Service was filed on June 14, 2004, with the district Court showing that all Defendants were served with process in accordance to Fed. R. Civ. P., Rule 4, et seq.

As the suit proceed on the docket and before notice from the District Judge the magistrate inquire if parties would consent to magistrate jurisdiction to which Petitioners declined. Thereafter, magistrate judge Leslie Smith transferred the case back to the District Judge.

Respondent's corporate director Mr. Thomas Doyle Basmajian was dismissed on the basis of his

motion, which the District Judge held that he was not properly served. Though, he was served by mailing the complaint together with the summons by certified U.S. mail to and received at his corporate head office, that is, Fairbanks Capital Corp., Utah and to the attorneys for Fairbanks Capital Corp. appearing in the case at the time. The proof of service signed for at both places on his behalf was filed in the record of the case.

On February 28, 2005 the District Judge issued order of reference, granting jurisdiction to magistrate judge to proceed on both, dispositive and non-dispositive matters. (Doc. 203). Respondents, timely filed their objections to the Order on March 10th 2005. (Doc. 204). This was the same magistrate, Molzen that on January 18, 2005, just a few weeks earlier was also the court designated mediator in the settlement conference held in the Las Cruses court-room. Though at the time she had said she is only handling the settlement negotiation. We knew by the end of the settlement conference that the magistrate was on the side of the Respondents. When we asked that the Respondents remove all the unlawful and wrongful late charges and penalties and pay us back the expenses we had incurred in bringing the suit.

We asked for the expense because Respondents had instituted foreclosure on our home in November 2002 in the county court here in Clovis, New Mexico after we have spent over four months trying to get them to correct their errors before we had to find the only lawyer who wanted to help us. Respondents

wanted to foreclose on our home after they kept our payments and mailed it back to us days after claiming it was late and when we called them they claimed it was less than the amount due. The mortgage was taken just a year earlier and we paid all of our life savings into the home so that we only owed about forty thousand of seventy thousand dollars. The FTC found the same complaints from several other peoples.

Instead magistrate Karen Molzen, the mediator had asked us to be glad they would stop the foreclosure if we pay them all their claimed charges.

This is after we have notified the court of the United States order by submitting a copy of the U.S. court and FTC order and injunction against Fairbanks Capital Corp. and Mr. Thomas D. Basmajian, both Respondents in this case issued, May 2004, in case *USA v. Fairbanks Capital Corp.*, United States District Court District of Massachusetts, No. 03-12219-DPW to the record.

Therefore, when our lawyer showed us the order that the same magistrate is now over the whole case, we know we could not get fairness in that court. Magistrate, Karen Molzen proceeded exercising jurisdiction without Respondent consent to magistrate. The magistrate judge conducted hearing, and considered several matters. (App. 26) They included discovery as well as matters pertaining to our claims and relief and thereafter issued orders and opinion covering both these dispositive and non-dispositive

matters. (App. 29) The magistrate ordered that all our communications and filings must be certified express mail, because some of the other lawyers complained that they don't like talking to our lawyer, though we explained we do not have that kind of money. Express certified mail cost us over twenty dollars each envelope. The judge also granted motions to deem admitted all legal issues demanded by Defendants as dispositive in the case.[1] We timely objected.[2] (App. 13, footnote)

Other than the settlement mediation and discovery notices magistrate, Karen Molzen conducted only one hearing, the hearing of August 11, 2005 (App. 43), in Las Cruses and Petitioners were there. Respondents came with five lawyers as usual. Halfway through the courtroom hearing, the magistrate started making statements that our case is destroyed with every statement of the other lawyers, Petitioners could no longer sit there, Petitioner's wife got up first.

Petitioner's wife asked the judge why she would not let our lawyer finish his statement and what has mail envelopes got to do with the unlawful mortgage lending practices?

Petitioner also got up, asking permission if he could speak after which he explained the deposition issue. Petitioner informed the judge that they are not

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[1] (Doc. 151)

[2] (Doc. 219)

hiding from deposition that Respondents did not contact their lawyer in time and that they knew that there was no agreed date and time. The Magistrate asked us if Petitioners would like to have another lawyer. On the six hour drive back to Clovis Petitioners were in shock. Petitioners' lawyer said the wrongful process would be corrected on appeal, well.

The magistrate issued opinion and orders, directing that we must disclose several years of our medical history record, that we are not entitled to certain claims and remedies. Petitioners filed objection, it was denied, Petitioners appealed the order to the Tenth Circuit, *James Drain et al. v. Wells Fargo Bank et al.* (05-2316) pursuant to United States Supreme Court, Cohen Exceptions, that a first amendment right is at stake. The appeal was dismissed by the Court for lack of jurisdiction without applying *Cohen Doctrine.*[3]

While that appeal was pending before the Tenth Circuit the magistrate judge issued her final findings, order dispositions, and recommendations dated December 16, 2005. (App. 75) Petitioners promptly filed their Objections to the magistrate order on December 23, 2005. The District Judge, adopted the magistrate orders and recommendations, dismissing our causes of actions with prejudice and sanctioned

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[3] *Cohen v. Beneficial Industrial Loan Corp., et al.*, 337 U.S. 541 (1949).

our attorney for $5,000.00 and disciplinary on March 2, 2006. (App. 12) That Appeal was perfected on March 30, 2006.

Petitioners filed their motion to stay all decision pending appeal, but the motion to stay enforcement of all orders was intentionally removed by District Clerk, Mr. Mathew Dykman in violation of due process.

The practice by the Federal Court for the District Of New Mexico where cases are assigned to a district judge and a magistrate judge named in the assignment as well as for the case and where the magistrate proceed on the case in view of objection and no consent from the litigant is contrary to our laws.

It is contrary to Article III of the Constitution. For example, in this case where Appellant may never get to appear before a district judge and the district judge may never actually presided on the case or review the facts nor perform the duty of arbiter of facts and the law as directed by our laws.

Therefore, magistrate judges whose record of prior affiliation and association are unknown and unavailable to the public may handle cases, and dismiss it before getting through discovery. This result, as in this case should be unlawful in that it may constitute violation of due process and denial of access to the Court. This practice is inconsistent with other federal jurisdictions.

Magistrate judges automatic exercise of jurisdiction on civil cases without a party's consent is not embodied in federal law. It is unconstitutional and we believe it violates our rights under due process and is contrary to practices in other federal jurisdictions.

For example in the Fifth Circuit, the district judge pursuant to Federal Rules for Civil Procedure, Rule 16 issues the first order in the litigation.

The first order by the district judge, directs the parties to confer for pretrial conference and status report. Amongst other things to be determined in the conference, first, is whether or not the parties consent to magistrate judge's jurisdiction. Therefore, federal district judges exercise jurisdiction first, then give the option for consent to magistrate judge to litigants. Where Plaintiffs refuse consent to magistrate, no magistrate involvement is allowed.

Petitioners believe their constitutional rights were violated by the United States District Court and the review of those rights were denied by the Tenth Circuit by not addressing the fundamental threshold issue of whether the magistrate upon whose findings, memorandum, opinion and orders our case was dismissed with prejudice has legitimate jurisdiction. Petitioners also reasonably believe that the order to disclose several years of medical history record in a predatory lending litigation by a consumer without weighing the need for disclosure versus the need for constitutional protection is a violation of their first amendment rights.

REASONS FOR GRANTING THE PETITION

Whether a judge has jurisdiction is a fundamental threshold issue, and the court of Appeals should have at least address the bases before proceeding on scolding our lawyer and affirming the lower court decision which was an adoption of the magistrate findings orders and recommendation. It should not be a toss of a coin in the federal court system whether your constitutional rights to fairness and due process would be considered.

It is also inconsistent that while other jurisdiction recognizes the *Cohen Doctrine* and would intervene to protect constitutional rights, here we petition the Court of Appeals immediately to save the prolong suffering we are going through, but it was never addressed. These anomalies are inconsistent with the holding of this court and in conflict with other circuits.

The review of these legal issues are also very important in that it address the basic constitutional rights to due process and fairness where the predatory lenders are able to get big law firms and frustrate the ordinary home owner rights stipulated in the laws of the United States instead of honoring the laws.

1. REVIEW IS WARRANTED TO RESOLVE WHETHER A LOCAL RULE IN THE UNITED STATES DISTRICT COURT SHOULD TRUMP THE CONSTITUTIONAL PROTECTION UNDER THE FIRST AMENDMENT RIGHT TO PRIVACY IN YOUR MEDICAL RECORD.

The local rule in question, D.N.M.L.R. Rule 26.3 which states "In all cases in which the physical mental medical condition of a party is an issue . . . ," that all medical records in the party's possession and all medical and health care history of Plaintiffs going back five years must be disclosed to Defendants is overbroad and in violation of the protection of medical records under the first amendment privacy laws.

The local rule here, in plain language is referring to cases in which the physical mental medical condition of a party is an issue, that would mean that the complaint was based on those injury or contact type of claims are the cause of action. Therefore, it requires some sort of analysis whether the physical mental medical condition were the claims here. We presented this argument to the magistrate judge, however, they did not address it.

However, in our case the claims are statutory provision under the federal consumer protection acts and physical mental medical condition was not the basis of our claim. Our claims were based on violation of the predatory lenders failure to disclose monetary calculations, interest rates, and the deceptive facts where we were sending our mortgage payment to them they received them several days before the due

date. Instead of crediting it to our account within a day or so and reduce the principal and the interest as required under consumer protection laws. They were holding our checks for several days and add late payment fees and additional interest to the amount due and later they would return the checks back to us as less than payment due. The delay intentionally created by these lenders resulted in huge penalties to us and windfall profit to them at our expense. Then they moved to foreclose on our home.

These exact violations were investigated by the United States Agency, the FTC, against these same Respondents and they were found in violation and the government obtained an injunction against them to stop and to also reverse all the late fees and unlawful penalties in the *FTC v. Fairbanks Capital Corp.* and its director Thomas Doyle Basmajian in May 2004.

Under the consumer protection acts, for example the TILA and the FDCPA, actual and additional damages are granted by statutes and the courts have held that these may include emotional distress claims as well as mental anguish, therefore, the local rule in question is in applicable and overbroad thereby must be rejected as not applicable. 15 U.S.C. § 1692(k) (West 2005); *Carrigan v. Central Adjustment Bureau*, 502 F.Supp. 468 (N.D. Ga. 1980).

Consumer protection litigations are not extensively litigated in this jurisdiction, but that does not mean it is a less important legal issue. The importance for the need to protect ordinary citizens, from

greedy and profit focused big corporations by deceipt, misrepresentation and unfair practices in financing and collection led the Legislatures to promulgate the consumer protection acts.

Congress and legislature of the various states promulgated statutory consumer protection laws holding lenders and collectors responsible to the consumer damages.

However, these remedies and the provision are in serious danger of being unattainable under the practice and application of the local rule employed by the United States District Court for District of New Mexico.

Respondents submit that, as applied and interpreted by the U.S. magistrate judge and adopted by the District Judge, the local Rule interpreted would stand to defeat the intent of the legislature to provide broad relief to the consumer, and create an inconsistency in our law and resulted in violation of consumers First Amendment rights.

The Eleventh Circuit has the opportunity to deal with this issues involving the parameter of the remedies allowed under TILA and FDCPA. The court applied the broad relief to the consumer consistent with the purpose and legislative intent.

The Courts have held consistently that, under the TILA as amended and the FDCPA the debt collector could be held for damages actually sustained by the consumer, including additional damages, costs

and the attorneys fees. *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985).

Furthermore, the courts have held that in order to fulfill the intent of Congress on consumer protection and follow the language of the statute, FDCPA is a strict liability statute and the fact that a violation of the statute occurred renders the Defendants liable for all actual and additional damages, including emotional distress and mental anguish, *Bingham v. Collection Bureau, Inc*, 505 F.Supp. 864 (N.D. Minn. 1981).

The circuits have followed Congressional intent in allowing additional remedies for emotional and mental anguish, without Tort's "physical condition requirement." See, *Bentley v. Great Lakes Collection Bureau,* 6 F.3d 60, 63-64 (2nd Cir. 1993); *Russell v. Equifax A.R.S.,* 74 F.3d 30, 33 (2nd Cir. 1996).

The purpose of the consumer protection act, for example, 15 U.S.C. § 1692, known as the debt collection practices act, was to eliminate abusive debt collection practices and provide full remedy to the consumers. An argument the District court overlooked.

That such obstacle would impose unwarranted scrutiny on the consumer instead of the collector and thereby defeat the purpose and the legislative intent of the consumer protection laws by opening the gate to extensive intrusion into the medical privacy interest of the class. Extensive examination of a party

medical history without probative value should be rejected. Constitutionality of the order to disclose must be examined before sanction.

The Courts have held that a first amendment right to privacy, is a substantial right issue which would affect the fairness and integrity of the judicial proceeding and must be weighed for probative value. *Jaffee v. Redmond*, 518 U.S. 1 (1996). Likewise, at the least, the district court should be concerned with the legislative intent and follow the well settled judiciary practice to err on the side of caution and in line with the purpose of the legislature to avoid unconstitutional decision. To accomplish these, the district court should have analyze the local rule, and the legal issues of Appellant's case to determine whether the "physical mental medical condition of a party is an issue" under the consumer protection statute.

Further, the district court could also review whether the legal issue of controversy, were lender-collector misrepresentation and non-disclosures therefore, the statutory remedies which allowed additional damages which may include emotional distress and mental anguish could not be considered as the legal issue in the case.

Therefore, it is either that the District of New Mexico local Rule 26.3(d) does not apply to this case under the Federal consumer protection acts, TILA and the FDCPA and the orders issued applying and enforcing it is overbroad and or inapplicable and

therefore unconstitutional. Thereby, that the sanctions, and dismissal with prejudice found by the district court violate Petitioners' constitutional rights.

These rights, which would be lost forever if unaddressed and where the sanctions chosen, which included the dismissal of their case with prejudice and monetary sanction against their attorney would result in chilling effect on rights under the first amendment, beg the review power of this Court. Therefore, granting the application would be a great opportunity to rule of fairness and to jurisprudence and to the ordinary people relying on our laws.

2. DOES ARTICLE III GRANT OF POWER TO UNITED STATES DISTRICT JUDGES APPOINTED BY THE PRESIDENT AND CONFIRMED BY THE SENATE AS JUDGES IN THE FEDERAL COURT INCLUDE THE POWER TO GRANT JURISDICTION TO A MAGISTRATE JUDGE UNDER THE MAGISTRATE ACT WITHOUT THE CONSENT OF A PARTY WITHOUT SUCH USE VIOLATING DUE PROCESS RIGHT?

In this rare situation and a unique opportunity presented by this case it appears that without addressing the magistrate jurisdiction issue no other constitutional violation would be violation after all. Though, Respondent did not consent to magistrate jurisdiction on dispositive matters as a result of which the first magistrate judge relinquishes the case in its infancy back to the District Judge, the District

Judge simply issued an order of reference granting jurisdiction to a magistrate judge.

Is the grant to the magistrate judge jurisdiction over dispositive matters in civil cases without Plaintiffs' consent, by the United States District Judge constitutional? Can a District judge confer jurisdiction on a magistrate judge over Petitioners' objection, without violation due process?

By granting this application this Court would be shedding light and direction in an area that is murky and frequently misapplied and so deservedly of guidance.

Under 28 U.S.C. § 636 concerning jurisdiction, powers and temporary assignment of magistrate judges, should magistrate judge be entitled to automatic jurisdiction over civil matters without the consent of the Plaintiff? If no, then it is unconstitutional and all orders or opinions issued pursuant to such unlawful jurisdiction should be null and void.

The Federal Magistrate Act, 28 U.S.C. §§ 631-639 were enacted by Congress in 1968 to upgrade and expand the former United States Commissioner system.

Under these provisions Justice Brennan explained in *Wingo v. Wedding,* 418 U.S. 461, 465 (1974), that they are allowed to try minor offenses when all parties consent and to perform such additional duties assigned by the district court as are "not

inconsistent with the Constitutions and laws of the United States."

The practical question here is, whether the practice in the United States Court for The District of New Mexico is consistent with the laws of the United States?

Where magistrate judges are not appointed under U.S. Const., Art. III have unfettered jurisdiction and where the litigants have no sources of reasonable information to determine impartiality or freedom from external pressure, either from the court or Congress, or prior association and or judicial disposition of the judge, does automatic mandatory exercise of jurisdiction without consent and over the objections of the litigant in civil actions consistent with the Constitutions and the laws of the United States?

In *Gomez v. United States,* 490 U.S. 858 (1976), the Court concludes that where there was objection to magistrate, exercise of jurisdiction by the magistrate is inconsistent with the Constitution and the laws of the United States. The order of reference by District judge conferring jurisdiction, therefore is unconstitutional.

The right to Article III judges in federal courts was intended to allow fairness and less undue influence on the court. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 563 (1985).

These influences may include from government itself or, as in this case, from large and influential law

firms and attorneys to whom the magistrate judges may have enjoyed or still enjoying professional association and benefits.

Though *Gomez* supra concerned criminal jurisdiction, in *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833 (1986), the court addressed the issue in a civil matter, and concluded similarly as in *Gomez* that, where the party objected magistrate does not have jurisdiction.

Likewise as in several other holdings, the courts have held that the structural protection provided by Article III may not be waived, and that district judge assignment is subject to the litigant's veto. *Schor,* at 850-851. In this case, not only did Petitioners object to the magistrate judge from start of their case, they have not consented at any point.

However, the complaints were ignored and were denied opportunity to present their case on its merit. The District Judge also missed the opportunity to promptly intervene, address and remove the magistrate from the case.

This case presents a unique circumstance addressed by Justice Blackmun, in his concurring opinion in *United States v. Raddatz,* 447 U.S. 667 685-686 (1980), where he stated amongst reasoning behind Article III protection from impartial tribunal, "Even assuming that, despite these protections a controversial matter might be delegated to a magistrate who is susceptible to outside pressures, the district judge – insulated by life tenure and irreducible

salary – is waiting in the wings, fully able to correct errors."

This unique scenario presented itself in this case but the District court and the Court of Appeals missed it as well, now the opportunity to address and correct the error lies with this Court. We believe that this Court would find that jurisdiction is a fundamental and a threshold issue and therefore must be determined before power can be exercised. A review is necessary to resolve and determine the limit of magistrate jurisdiction in the United States courts consistent with the laws and the Constitution of the United States.

3. WHETHER SERVICE OF PROCESS COMPLETE ON A DIRECTOR OF A CORPORATE ENTITY WHEN THE COMPLAINT AND THE SUMMONS WERE SERVED ON THE CORPORATE ADDRESS OF THE DIRECTOR AND UPON HIS ATTORNEYS?

Under Fed. R. Civ. P. Rule 4(c), et seq., where Defendant, a corporate Director was served by certified and regular mail, at his corporate address as well as, at his corporate attorneys' address, was the service complete? *Volkswagenwerk A.G. v. Schlunk*, 486 U.S. 694, 700 (1988).

Service of summons, together with the complaint on attorneys for a Defendant would be sufficient under Rule 4, *Murphy Bros. v. Mitchell Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999). The issue here is

whether since the service was effected by certified U.S. Mail, received, signed for by his agents and return of service filed in the record of the case is the service complete?

Respondent, Thomas Doyle Basmajian was the corporate director of Fairbanks Capital Corp., Utah at the time the violations occurred. The corporation was served through each agent of service by certified U.S. Mail and Respondent was served the complaint together with summons at two lawful places. First, at the address for Fairbanks Capital Corp. head office in Utah and second, on its attorneys at the time as well. *Magnuson v. Video Yesterday*, 85 F.3d 1424, (9th Cir. 1996). We believe the Court would find that the service was complete as required.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JAMES DRAIN and RACHEL DRAIN,

Plaintiffs-Appellants,

v.

ACCREDITED HOME LENDERS INC.; BASMAJIAN T. DOYLE, Director; WELLS FARGO BANK, MINNESOTA, N.A., as Trustee for ITLA Mortgage, Loan Securitization 2002-1, LLC; FAIRBANKS CAPITAL CORP., UTAH,

Defendants-Appellees.

No. 06-2096
(D.C. No. CIV-04-399 MV/KBM) (D.N.M.)

(Filed Mar. 14, 2007)

ORDER AND JUDGMENT*

Before **KELLY, ALARCÓN,**** and **LUCERO**, Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** The Honorable Arthur L. Alarcón, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

James and Rachel Drain, through their attorney Mike Bello, brought suit against Wells Fargo Bank, Minnesota, N.A. as trustee for ITLA Mortgage Loan Securitization 2002-1, LLC ("Wells Fargo"), Accredited Home Lenders, Inc., Fairbanks Capital Corp. ("Fairbanks"), and Basmajian T. Doyle,[1] alleging violations of several state and federal consumer protection laws. After Bello engaged in numerous instances of unprofessional conduct, the district court dismissed Drains' case under Federal Rule of Civil Procedure 37 and fined Bello $5,000 under Rule 11. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we **AFFIRM**.

I

We see no need to repeat the many instances of Bello's misconduct, which the district court ably recounted in its Amended Memorandum Opinion and Order, entered March 2, 2006. Instead, we offer here a broad outline of the proceedings below. Drains, by and through Bello,[2] filed a complaint in April 2004. Bello attempted to serve the defendants by sending summonses via certified mail, even though no defendant had waived personal service. All of the defendants

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[1] This apparently refers to Thomas D. Basmajian, a former officer of Fairbanks.

[2] For the sake of clarity, we hereinafter attribute the actions Bello took on behalf of the Drains to Bello. Although this differs from the normal practice, we deem it appropriate because Drains' case was dismissed largely due to actions taken by Bello.

except Basmajian effectively waived service by responding with motions to dismiss and motions for a more definite statement, due to the complaint's "incompleteness and incoherence." The court temporarily assigned the case to a magistrate judge and issued the parties magistrate consent forms to be returned to the court. *See* D.N.M. Civ. R. 73. Before the parties returned their consent forms, the magistrate judge granted defendants' motions for a more definite statement and denied their motions to dismiss. No party objected to this order.

Bello filed an amended complaint with the same deficiencies as the first. Defendants again filed motions to clarify or dismiss, noting that numerous authorities cited in the complaint did not stand for the proposition for which they were cited. Nevertheless, the magistrate judge denied the motions and ordered defendants to file answers. After Bello failed to return the magistrate consent form, the case was assigned to Chief Judge Vazquez, who ordered a second magistrate judge to conduct hearings and recommend dispositions on various pending motions pursuant to 28 U.S.C. § 636(b)(1)(B).

Bello then moved for a default judgment against Basmajian, who had never responded to the complaint. The court clerk refused to enter judgment, noting that effected service had not been returned. Basmajian entered a limited appearance and moved for dismissal due to lack of service. Bello filed an untimely response and a second request for default judgment, which was also denied. The district court

ultimately entered an order dismissing the claims against Basmajian for lack of service. Bello subsequently filed a "Motion to Vacate" the dismissal, in which essentially every authority is cited for a proposition for which it does not stand. The magistrate judge recommended that the dismissal be affirmed. However, before the court could act on that recommendation, Bello filed a petition for a writ of mandamus in this court seeking vacatur of Basmajian's dismissal. That petition was denied. *In re Drain,* No. 05-2080 (10th Cir. April 5, 2005). The district court later adopted the magistrate judge's recommendation.

After the magistrate judge recommended ruling against Bello, he began filing "objections" arguing that magistrate judge involvement without a party's consent was unconstitutional. Finding the argument meritless, the court informed Bello that referring a matter to a magistrate judge for recommendations does not require consent of the parties and that the proper method of objecting to an order is to file a motion under Rule 59 or 60. It also warned him that making frivolous arguments could subject a party to sanctions. The court chastised Bello as follows: "If Plaintiff's counsel had conducted any legal research, or even read the statute, he would have discovered that his argument was contrary to the plain language of the statute and Tenth Circuit caselaw." Moreover, the court expressed concern that Bello's "fundamental misunderstanding, or lack of familiarity with, the Federal Rules of Civil Procedure and the Court's local rules, is jeopardizing the Plaintiff's case." It ordered

Bello to read the Federal and Local Rules of Civil Procedure, and to provide a copy of its order to Drains. Nevertheless, Bello continued to file "objections" or "responses" to virtually every document issued by the magistrate judge.

Bello's conduct became more egregious as the court attempted to fashion a discovery plan. He failed to respond to numerous discovery requests, interrogatories, and requests for admission. He similarly disregarded an order granting defendants' motions to compel production of this information. Drains themselves also ignored discovery orders despite the court's explicit warning that doing so would lead to sanctions. They failed to appear for their properly noticed depositions, set on dates provided by Bello. Their initial disclosures were also deficient, failing to include required medical information.[3] The magistrate judge granted a motion to compel the disclosures, but rather than complying with the order or requesting a stay, Bello filed a motion for a protective order, asserting that the disclosure rule violated Drains' First Amendment right to privacy. Although the motion was denied, no medical documents were ever submitted.

Throughout the case, Bello made numerous unfounded accusations against opposing counsel and

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[3] Under Local Rule 26.3(d), plaintiffs are required to submit certain medical information when they put their physical or mental health at issue.

court personnel. He consistently characterized opposing counsels' often valid arguments as "illegal," "vexatious," "frivolous," "unethical," or "bogus." He also accused opposing counsel of filing frivolous motions in an effort to overbill clients. At one hearing, when opposing counsel produced relevant documents, Bello accused the magistrate judge and opposing counsel of attempting to "ambush [him and his clients] and obtain an unjust and predetermined result." In a motion seeking recusal of Chief Judge Vazquez, he accused her, without foundation, of personal bias against his clients and of gaining knowledge of disputed facts from sources outside the proceedings. The district court eventually took the extreme step of forbidding verbal communication between Bello and opposing counsel.

Bello also appears to have submitted a number of falsified certificates of service. Defense counsel raised this issue with the court, requesting sanctions, and the magistrate judge granted an evidentiary and sanctions hearing. At the hearing, defense counsel submitted a number of documents in which the postage date differed from Bello's certification date by as many as eight days. Bello denied falsifying the dates, arguing that defense counsel may have switched the envelopes. Following the hearing, Bello attempted to appeal several pretrial orders in this court, but that appeal was dismissed for lack of appellate jurisdiction. *Drain v. Wells Fargo Bank, Minnesota, N.A.*, No. 05-2316 (10th Cir. Oct. 27, 2005).

Ultimately, the magistrate judge recommended that the court dismiss Drains' case under Rule 37 and personally fine Bello $5,000 under Rule 11. The district court entered an order on March 1, 2006, adopting most of the magistrate judge's recommendations; however, it expressly chose not to rely on Drains' failure to submit medical information as part of their initial disclosures. The court entered an order the next day clarifying to whom Bello's sanctions were to be paid and another on March 28, 2006 clarifying that Wells Fargo's counterclaims were dismissed without prejudice. Drains now appeal, still yet represented by Bello.

II

We review the imposition of Rule 37 sanctions for abuse of discretion. *Ehrenhaus v. Reynolds,* 965 F.2d 916, 920 (10th Cir. 1992). Because dismissal is the ultimate sanction, it is appropriate only in cases of willful misconduct. *Id.* Before dismissing a case under Rule 37, a court must consider: "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; . . . (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." *Id.* at 921 (citations and quotations omitted).

After a thorough review of the record and the briefing, we substantially agree with the district

court's characterization of Bello and Drains' malfeasance. The district court properly considered the *Ehrenhaus* factors in this case, finding: (1) Defendants were severely prejudiced as a result of Bello's wilful obstruction, such that "nearly two years and over two hundred docket entries later, Defendants are no closer to understanding the basis for Plaintiffs' claims than they were when the claims were filed"; (2) An "inordinate amount of judicial time" was consumed by Bello's tactics, and that "it is hard to imagine how a party could be more obstructive"; (3) Drains were personally advised of the consequences of Bello's actions by the court, yet continued to employ Bello as their attorney; (4) Drains were warned numerous times that sanctions, including dismissal, may be imposed; and (5) "Given the number and degree of violations Plaintiffs have committed and the lack of any indication that Plaintiffs intend to change course, a lesser sanction [did] not appear effective." We conclude that the district court did not abuse its discretion in dismissing Drains' case.

III

Like Rule 37 sanctions, we review the imposition of Rule 11 sanctions for abuse of discretion. *Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1155 (10th Cir. 1991). Such sanctions are appropriate when an attorney files documents with the court for an improper purpose, advances frivolous arguments, or makes unsupported allegations. Fed. R. Civ. P. 11(c).

The district court found that Bello submitted false certifications, attempted to mislead the court by mis-citing authorities, and intentionally delayed proceedings by filing frivolous objections. Once again, our review of the record leads us to the same conclusions. Accordingly, we hold that the district court did not abuse its discretion in imposing sanctions under Rule 11.

We further note that Bello's unprofessional conduct has continued at the appellate level, where he accuses the district clerk of intentionally falsifying the case docket, and the magistrate judge of being unduly influenced by "large and influential law firms and attorneys to whom the magistrate judges may have enjoyed or still enjoying [sic] professional association and benefits." In his brief, Bello argues that: (1) D.N.M. Civ. R. 26.3(d), which requires certain medical disclosures, is unconstitutional; (2) Magistrate judges may not hold hearings or issue recommendations without the parties' consent; and (3) A corporate officer may be served by mailing the complaint to his corporate office, or the office of his attorney. In addition to being fundamentally incorrect, these points are entirely irrelevant. The questions before us are whether the district court abused its discretion in dismissing Drains' case and fining Bello. Finally, we are disturbed that Bello continues to miscite cases even after the district court pointed out his error. For example, he cites *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999), for the proposition that "[i]t is well settled

that service of summons and complaints on attorneys for a Defendant is sufficient." As the district court noted, *Murphy Bros.* addresses when the thirty-day time period for removal begins, not the proper method for service.

IV

AFFIRMED.

ENTERED FOR THE COURT

Carlos F. Lucero
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JAMES DRAIN and
RACHEL DRAIN, *et al.*,

Plaintiffs,

vs.

Civ. No.
04-0399MV/KBM

WELLS FARGO BANK,
MINNESOTA, NA, as
TRUSTEE for ITLA MORTG.,
LOAN SECURITIZATION
2002-1, LLC, and ACCREDITED
HOME LENDERS INC., and
FAIRBANKS CAPITAL CORP.,
UTAH and its Director,
BASMAJIAN T. DOYLE,

Defendants.

AMENDED MEMORANDUM OPINION AND ORDER[1]

THIS MATTER comes before the Court on Defendant Fairbanks' request for sanctions and attorney fees for their discovery motion filed March 8,

[1] The Memorandum Opinion and Order filed on March 1, 2006, is being amended because the Court incorrectly ordered the $5000 monetary sanction to be paid to Defendant Accredited Home Lenders and Defendant Fairbanks Capital Corp. rather than to Defendant Wells Fargo and Defendant Fairbanks Capital Corp. In all other respects, the Amended Memorandum Opinion and Order is identical to the March 1, 2006 Memorandum Opinion and Order.

2005, **[Doc. No. 861]**,[2] Defendant Accredited Home Lenders, Inc.'s Motion for Order to Show Cause and Contempt, filed April 13, 2005, **[Doc. No. 131]**; Defendants Fairbanks and Wells Fargo's Motion for Discovery Sanctions, filed June 20, 2005, **[Doc. No. 152]**; Defendant Accredited Home Lenders, Inc.'s Motion for Discovery Sanctions, filed June 23, 2005, **[Doc. No. 175]**; and Defendant Fairbanks and Wells Fargo's Motion for Sanction, filed April 1, 2005, **[Doc. No. 117]**.

Regrettably, these motions require the Court to consider whether to impose the ultimate sanction – dismissal of the case – for an ongoing and unrelenting course of improper and vexatious conduct by Plaintiffs and their counsel. Plaintiffs and their counsel's conduct in this case has been marked by repeated failures to follow the requirements imposed on all parties and their representatives in this Court; unsupported accusations against the Court and other counsel; purposefully misleading statements and citations; and a complete lack of understanding of this Court and its process. To operate effectively, our judicial system relies on the appearance of advocates who will represent their clients with a level of ethics, competence, and decorum commensurate with their

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[2] The Magistrate Judge's Findings of Fact and Recommended Disposition references Defendant Fairbanks' filing at Docket Number 87 as also seeking attorney's fees. The Court has reviewed this document, however, and sees no request for attorney's fees contained within it.

professional status. When advocates fail to meet that standard, opposing parties are prejudiced, the Court's ability to judge disputes is hampered, and our judicial system cannot operate at the level our society demands. In this case. Plaintiffs and their counsel have so interfered with the efficient and effective operation of the judicial system that Defendants have been forced to seek dismissal of the case as a sanction for Plaintiffs and their counsel's conduct.

The Magistrate Judge assigned to this case held a hearing on Defendants' motions for sanctions ("Sanctions Hearing"), and recommended that the case be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 37 and that monetary sanctions be imposed against Plaintiffs' counsel, Mike Bello. *See* Proposed Findings and Recommended Disposition, filed December 16, 2005, [Doc. No. 220]. Plaintiffs timely filed objections to the proposed findings and recommended disposition.[3] *See* Plaintiffs [sic] Objections to Magistrate Judge Molzen [sic] Memorandum and Recommendation on Plaintiffs [sic] Cause, filed December 27, 2005, [Doc. No. 221].

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[3] Plaintiffs objected to the Magistrate Judge's "continuous exercise of jurisdiction in this case, 3 months into the appeal challenging her jurisdiction and which is still before the Court of Appeals in violation of due process." Plaintiffs [sic] Objections to Magistrate Judge Molzen [sic] Memorandum and Recommendation on Plaintiffs [sic] Cause, filed December 27, 2005, [Doc. No. 221]. The Tenth Circuit, however, dismissed Plaintiffs' appeal on November 3, 2005, and Plaintiff's motion for rehearing was denied on December 7, 2005.

The Court has reviewed the entire record in this case, including the motions, the transcript of the Sanctions Hearing, the proposed findings and recommended disposition, and Plaintiffs' objections. Plaintiffs have not requested an additional hearing, and, based on its review of the record, the Court has concluded that another hearing is not necessary.

FACTUAL FINDINGS

The Court's recitation of the factual background of these matters will be limited to discussion of the acts that Defendants assert warrant sanctions and that otherwise formed the basis of the Magistrate Judge's recommendation that sanctions be imposed.

A. Plaintiffs' Failure to Participate in Discovery as Required by the Federal Rules of Civil Procedure and the Local Rules.

Defendants have raised several instances of Plaintiffs' failure to respond to properly served discovery.

1. Plaintiffs' Failure to Respond to Written Discovery Requests

The record reveals that Plaintiffs failed to serve complete and timely responses to numerous discovery requests, including Defendants' interrogatories, requests for production and requests for admissions.

Plaintiffs' failures to respond have forced Defendants to file motions to compel responses to virtually every discovery request. Plaintiffs then failed to file timely responses to the vast majority of Defendants' motions to compel. The Magistrate Judge ultimately granted all of Defendants' numerous motions to compel, finding that Plaintiffs' responses were untimely, incomplete, evasive, and, at times, nonsensical. The Magistrate Judge ordered prompt service of full responses to Defendants' discovery requests without objections. *See, e.g.,* June 17, 2005 Memorandum Opinion and Order, [Doc. No. 151] and August 30, 2005 Order, [Doc. No. 207].[4] There is no evidence that Plaintiffs ever complied with the Magistrate Judge's orders.

2. Plaintiffs' Failure to Appear for Depositions

Plaintiffs also failed to appear for their depositions, which Defendants had properly noticed for dates suggested by Plaintiffs' counsel. In March, 2005, Defendants began trying to set dates for Plaintiffs' depositions. Defendants' counsel twice inquired about potential dates for Plaintiffs' depositions but Plaintiffs did not respond. Defendants, therefore, set

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[4] Plaintiffs, rather than filing objections in this Court, appealed the Magistrate Judge's August 30, 3005 discovery order to the Tenth Circuit. The Tenth Circuit promptly dismissed the appeal for lack of jurisdiction. October 27, 2005 Order [Doc. No. 219].

the depositions of Plaintiffs on May 19 and May 20, 2005. Upon receipt of the deposition notices, Mr. Bello sent a letter stating that the May 19 and 20 dates were "in conflict" with his schedule and advised that "the week of May 30, 2005 thru June 2, 2005 is available and could be worked out on further consultation for a definite confirmation." Doc. No. 153, Ex. 6. In accordance with Mr. Bello's request, Defendants reset Plaintiffs' depositions for June 1st and June 2nd and served Amended Notices of Deposition.

On May 27, 2005, Mr. Bello faxed a letter to Defendants stating that he had not received word about the final scheduling of the depositions and that his clients were no longer available for deposition on the dates he had provided. Defendants immediately responded via fax that the depositions had been properly noticed and that Plaintiffs were expected to appear as scheduled. Defendants attached copies of the Amended Notices of Deposition and the certified mail return receipt showing delivery of the Amended Notices on May 17, 2005. Mr. Bello did not respond to this fax and Plaintiffs did not appear for their scheduled depositions.

At the Sanctions Hearing, Mr. Bello admitted that the person who signed the certified mail return receipt for the Amended Notices of Deposition was authorized to accept mail on his behalf but maintained that he had not received the Amended Notices of Deposition. Mr. Bello did not deny, however, that he received Defendants' May 27, 2005 fax enclosing copies of the Amended Notices of Deposition and the

certified mail return receipt showing delivery of the Amended Notices of Deposition on May 17, 2005. At that point, Mr. Bello was certainly aware that the depositions had been properly noticed. Mr. Bello, however, did not file a notice of nonappearance or move for a protective order. Mr. Bello contended that he was not required to file a notice of nonappearance or move for a protective order because "I would think that the notice of nonappearance or for protection would only be necessary it we feel we don't need to be deposed, but we agreed to be deposed." Transcript of Sanctions Hearing at p. 117. Mr. Bello then suggested that Defendants were at fault for showing up at the deposition when they "knew a few days before the deposition that we are not in the same mindset." *Id.* at 120.

3. Plaintiffs' Failure to Provide Healthcare Information In Their Initial Disclosures

Defendants also assert that Plaintiffs' initial disclosures were deficient. On December 14, 2004, the Court entered an Order requiring Plaintiffs to serve their initial disclosures on or before December 22, 2004. *See* Order Assigning Standard Track and Setting Pretrial Deadlines, [Doc. No. 55]. Plaintiffs served their initial disclosures by that deadline, but did not include the healthcare information required by Local Rule 26.3(d). *See* D.N.M.LR-Civ. 26.3(d) requiring disclosure of certain healthcare information by a party whose physical or mental medical condition is an issue

in the case). Defendant Accredited Home Lenders. Inc., filed a motion to compel the disclosures required by Local Rule 26.3(d). Plaintiffs opposed this motion on the grounds that Plaintiffs' physical or mental conditions were not an issue in this case, and that Local Rule 26.3(d) was inconsistent with the Federal Rules of Civil Procedure and violated Plaintiffs' privacy rights under the First Amendment and New Mexico law. The Magistrate Judge rejected Plaintiffs' arguments and granted the motion to compel.

Plaintiffs filed objections to the Magistrate Judge's order granting the motion to compel and, on the day the disclosures were due under the order, filed a motion for protective order. Plaintiffs did not, however, seek a stay of the Magistrate Judge's order. This Court overruled the Plaintiffs' objections on August 1, 2005, finding that Local Rule 26.3(d) applied to Plaintiffs' claims. *See* Amended Memorandum Opinion and Order, filed August 1, 2005, [Doc. No. 197].

At the August 11, 2005 Sanctions Hearing, Mr. Bello stated that Plaintiffs would provide the medical information and releases to Defendants:

> Now that the Court has – I mean, the Chief Vazquez has made the final ruling on it that is specific to the claim rather than the broad medical history of my clients for the past five years are specific to their claim that those – that she – that the Court finds that those medical information that we have should be provided, and we will produce those.

Transcript of Sanctions Hearing at p. 44. A few minutes later, however, Mr. Bello stated that "there is no medical information that we have that we are withholding," and that "[w]hatever [Plaintiffs] have concerning how they deal with stress will be used – or that may be used as evidences [sic] towards their emotional claim, we will produce those records." *Id.* at 45 & 48. There is no evidence that Plaintiffs have provided any medical information or releases to Defendants.

While the Court agrees that Local Rule 26.3(d) applies to this case, the Court disagrees with the Magistrate Judge's conclusion that failure to provide any medical information or releases necessarily constitutes a discovery violation. Originally Local Rule 26.3(d) required disclosure of *all* medical information in all cases in which the physical or mental condition of a party was at issue. D.N.M.LR-Civ. 26.3(d) (1999). In 2002, however, the rule was narrowed to require disclosure only of medical information that *the disclosing party may use to support its claims or defense.* D.N.M. LR-Civ. 26.3(d) (2002).

While the Court could not find any published caselaw interpreting Local Rule 26.3(d), the plain language of the statute suggests that a party need provide, as part of its initial disclosures, only the medical information it intends to use to support its claims or defenses. While additional medical information may be discoverable, it is not required by Local Rule 26.3(d) to be disclosed in the initial disclosures. Consequently, Plaintiffs' failure to provide any such

information in their initial disclosures is arguably not a violation of Local Rule 26.3(d) as long as Plaintiffs do not intend to use medical information to support their claims. Thus, while Plaintiffs' failure to provide this information as part of their initial disclosures may prohibit Plaintiffs from relying on such information in support of their claims, it is not necessarily a discovery violation and the Court will not rely upon it as a basis for imposing sanctions.[5]

B. Plaintiffs' Unfounded Accusations Against Opposing Counsel and the Court

On February 14, 2005, the Magistrate Judge was forced to take the unusual step of requiring only written communications between the parties due to Plaintiffs' repeated accusations against opposing counsel of unethical and unprofessional behavior. While the written communication order may have curtailed Plaintiffs' accusations based on oral conversations, Plaintiffs continued making baseless accusations against both Defendants and the Court. Nearly every document filed by Plaintiffs contains accusations of unprofessional conduct or bias by Defendants and/or the Court. And, as noted by the Magistrate

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[5] This conclusion would be different if the Court had ordered Plaintiffs to produce certain information pursuant to Local Rule 26.3(d) and Plaintiffs refused. In this case, however, the Court simply ordered Plaintiffs to produce the disclosures required by Local Rule 26.3(d) and, arguably, Plaintiffs have complied with this order.

Judge, these accusations became increasingly vitriolic as the case progressed. Notably, many of Plaintiffs' allegations were based on wholly legitimate acts. For example, Defendants once hand-delivered a package to the address where Mr. Bello receives his mail. Calling such an act "deceptive," Plaintiffs requested that the Court order "Defendants to straighten up and desist from any such further unethical and unlawful actions." Plaintiffs [sic] Objections and Responses to Testimony and Documents Submitted by Attorneys Ms. Cynthia Tessman and Dylan O'Reilly at Hearing of August 11, 2005, filed August 31, 2005, [Doc. No. 208] at p. 7.

Other accusations made by Plaintiffs were based solely on speculation. For example, the Magistrate Judge held a hearing on several motions including motions that raised the issue of frequent and consistent discrepancies between postmark dates and certification dates on pleadings served by Plaintiffs. When Defendants brought the relevant documents to the Sanctions Hearing, Mr. Bello asserted that Defendants brought the documents with possible approval of the Magistrate Judge in an attempt to "ambush them and obtain unjust and predetermined result." *Id.* at p. 5. Plaintiffs, also without any evidentiary support, characterized the documents and the testimony regarding the documents as "bogus, misrepresentation bad faith, and unethical maneuvers of process." *Id.* at p. 6.

Another category of Plaintiffs' accusations include those based on Plaintiffs' erroneous interpretation of

law. Plaintiffs, citing no legal support, filed a motion requesting that the "Chief District Judge make the mandatory self examination and the mandatory full disclosures under 28 U.S.C. § 455 et seq."[6] *See* Plaintiffs [sic] Request for Disclosure Under 28 U.S.C. § 455 to the Court, filed July 6, 2005, **[Doc. No. 185]**. And, when the Court did not agree to this unprecedented and unsupported request, filed a motion to recuse because "[c]learly, the Chief Judge has personal bias against the Plaintiffs [sic] causes and interests and may also include having personal knowledge of disputed evidentiary facts of these proceedings gathered from sources outside of the proceedings." *See* Plaintiffs [sic] Motion to Recuse the Chief District Judge Together With Certificate of Good Faith, filed August 11, 2005, **[Doc. No. 204]**.

The Court finds no basis for Plaintiffs' accusations of bias and bad faith against either the Court or opposing counsel. While at times the Magistrate Judge spoke bluntly to Mr. Bello about his conduct and arguments, these comments do not support Plaintiffs' accusations of judicial bias. Mr. Bello's unsupported and unwarranted accusations against the Court and opposing counsel reflect his lack of

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[6] Section 455 enumerates specific standards for disqualification of trial judges. It is meant to be self-enforcing, and imposes an affirmative duty upon all judges to independently evaluate any facts that may cast doubt upon their impartiality. Nothing in Section 455, however, requires a judge to provide any disclosures to a party.

respect for the judicial system and his disregard of his obligations as an officer of the court.

C. Plaintiffs' Counsel's Certification of Incorrect Service Dates

Defendants assert that throughout the case, pleadings served by Plaintiffs have been postmarked many days after the service date listed on the verified certificate of service. Early in the litigation Defendants alerted the Court to a number of discrepancies in the postmark date and the certificate of service date on Plaintiffs' pleadings. In older to create a reliable record regarding when and how service was accomplished, at the initial Rule 16 hearing held December 14, 2004, the Magistrate Judge ordered counsel "to make service of all pleadings by certified mail." Clerk's Minutes, filed December 15, 2004, [Doc. No. 54]. Plaintiffs ignored this order and the issue of incorrect certifications continued to divert the attention of the Court and the parties from the merits of the case.

At the Sanctions Hearing, Defendants offered numerous documents mailed to them from Plaintiffs where the actual postmark date differed by as much as eight days from the certification date.[7] Defendants

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[7] A chart listing these documents and the discrepancy in the mailing and certification dates is contained in the Magistrate Judge's recommended disposition.

authenticated these documents with witnesses who were subject to cross-examination at the hearing. Even though the issue of false certifications had been raised in the motions noticed for the hearing, Plaintiffs contended that they were "ambushed" at the hearing with these exhibits. Consequently, the Magistrate Judge permitted Plaintiffs to file a written response to the postmark/certification testimony and documents after the hearing.

In their written response, Plaintiffs questioned whether Defendants accurately kept track of which documents were sent in which envelopes and imputed a bad faith motive to Defendants for keeping such records. Mr. Bello also submitted an affidavit that Plaintiffs' response characterizes as stating that all the document he served were delivered for the mail and or put in the mail on the dates stated on the certificate of service." Plaintiffs [sic] Objections and Responses to Testimony and documents Submitted by Attorneys Ms. Cynthia Tessman and Dylan O'Reilly at Hearing of August 11, 2005, filed August 31, 2005, [Doc. No. 208], at p. 7. To the contrary, the affidavit Mr. Bello submitted states, in its entirety, that:

> 1. That I am Mike Bello, the attorney for Appellant in the above named and numbered cause and that I am competent and of sound mind and above the age of 21 years old.
>
> 2. That the statements contained in this document are true and correct according to my knowledge and it was made for the purpose of justice and not for delay.

Id. at Ex. A. This affidavit, of course, states nothing. It certainly does not suggest that Mr. Bello mailed documents in a manner consistent with his certifications.

Plaintiffs also submitted an affidavit from Mike Moralez, owner of the Pack & Mail business in Clovis, that states that he handles the mailings for Mr. Bello. *Id.* at Ex. B. This affidavit similarly provides no information on how the mailings are handled and no explanation for the discrepancies between the postmarked dates and the certificate of service dates.

In short, Plaintiffs presented no evidence explaining the discrepancies between the postmark dates and the certificate of service dates. The overwhelming evidence compels the finding that Plaintiffs repeatedly prepared false certificates of service.

D. Plaintiffs' Counsel's Lack of Familiarity With Court Procedure and Failure to Follow Rulings of Court

Throughout this proceeding Plaintiffs' counsel has demonstrated a complete lack of understanding of federal civil procedure and has refused to follow the Court's direction and orders clarifying the applicable law and procedure. First, Plaintiffs refused to accept the Court's authority to refer the case to a magistrate judge to make findings of fact and recommended dispositions on motions. Relatively early in the case, the Court determined that the case would benefit from close management and monitoring to ensure

compliance with the Federal Rules of Civil Procedure and the principles of the Civil Justice Reform Act. Consequently, on February 28, 2005, the Court entered an Order of Reference referring the case to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) to make proposed findings of fact and recommended dispositions on all motions. *See* February 28, 2005 Order of Reference, [Doc. No. 78]. Plaintiffs filed "objections" to the Order of References asserting that the reference to the Magistrate Judge was unconstitutional because Plaintiffs had not consented to magistrate judge jurisdiction. *See* Plaintiffs' Response and Objections to District Judge Vasquez [sic] Order of Reference Pursuant to 28 U.S.C. § 636, filed March 10, 2005. [Doc. No. 90]. Plaintiffs also filed a motion to vacate all of the proposed findings and recommended dispositions made by the Magistrate Judge pursuant to the Order of Reference. See Plaintiffs [sic] Motion to the Court to Vacate Orders, filed March 22, 2005, [Doc. No. 105].

The Court construed Plaintiffs' filing, which was filed within ten days of the filing of the Order of Reference, as a motion for reconsideration. The Court went on to deny Plaintiffs' motion, noting that:

> Even a cursory review of Plaintiffs' filings reveal that the argument is wholly without merit. While magistrate judges may not decide certain motions without the consent of the parties, the statute clearly provides that a judge may "designate a magistrate judge to . . . submit to a judge of

> the court proposed findings of fact and recommendations for the disposition . . . of any motion." 28 U. S.C. § 636(b)(1)(B). Referring a matter to a magistrate judge to propose findings of fact and recommended disposition does not require the consent of the parties. *See Garcia v. City of Albuquerque,* 232 F.3d 760, 766 (10th Cir. 2000) ("28 U.S.C. § 636(b)(1)(B) does not require the consent of the parties").
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> If Plaintiffs' counsel had conducted any legal research, or even read the statute, he would have discovered that his argument was contrary to the plain language of the statute and Tenth Circuit caselaw. Plaintiffs' position is wholly without legal merit and Plaintiffs' objections to the Order of Reference, which is actually a motion for reconsideration, and Plaintiffs' motion to vacate will be denied.

June 21, 2005 Memorandum Opinion and Order, [Doc. No. 172], at pp. 5-6. The Court went on to caution Plaintiffs about filing frivolous arguments:

> Plaintiffs are hereby cautioned that frivolous arguments may subject Plaintiffs and/or their counsel to Rule 11 sanctions. *See* Fed. R. Civ. P. 11(b)(2) (by presenting a motion to the court, an attorney is certifying that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . [the] legal contentions therein are warranted by existing law or by a nonfrivolous argument

> for the extension, modification, or reversal of existing law or the establishment of new law.") An argument contained in a motion is frivolous under Rule 11 if it is unreasonable when viewed from the perspective of "a competent attorney admitted to practice before the district court." *Zaldivar v. City of Los Angeles,* 780 F.2d 823, 830 (9th Cir. 1986); *see also Eastway Constr. Corp. v. City of New York,* 762 F.2d 243, 254 (2d Cir. 1985) (Rule 11 is violated when, "after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law").

Id. at pp. 6-7.

In the Order, the Court explicitly instructed Plaintiffs that if a party believes the district court has issued an order contrary to the facts or law, the proper course is to file a motion pursuant to Fed. R. Civ. P. 59 or 60, not a "response" or "objections." Nonetheless, Plaintiffs subsequently filed "objections" to this Order. *See* Plaintiffs [sic] Objections to the Court Order, filed July 8, 2005. [Doc. No. 187]. These "objections, once again, were construed as a motion for reconsideration and denied as without basis. *See* March 2, 2006 Memorandum Opinion and Order, [Doc. No. 226]. Despite the Court ruling on this issue twice and the utter lack of support for Plaintiffs' position, Plaintiffs continued to argue in nearly every

subsequent filing that the Magistrate Judge did not have jurisdiction to make proposed findings and recommended dispositions on motions. At time, Plaintiffs even challenged whether the Magistrate Judge had authority to rule on discovery motions.

Second, Plaintiffs demonstrated an inability to comprehend how parties are served under the Federal Rules of Civil Procedure and refused to accept the Court's determination that Defendant Basmajian had been improperly served. On October 6, 2004, Plaintiffs filed a motion for entry of default against Defendant Basmajian. *See* Plaintiffs [sic] Request With Affidavit to the Court for Entry of Default Against Defendant Basmajian T. Doyle, filed October 6, 2004, [Doc. No. 31]. The clerk refused to enter the default because there was no evidence that service had been effected. Defendant Basmajian filed a motion to dismiss contending, in part, that he had never been properly served. Plaintiffs opposed this motion and filed a second motion for default judgment against Defendant Basmajian. *See* Plaintiffs' Motion for Default Judgment, filed November 18, 2004, [Doc. No. 44] and Plaintiffs [sic] Second Request With Affidavit to the Court for Entry of Default Against Defendant Basmajian T. Doyle, filed November 18, 2004, [Doc. No. 43]. On January 14, 2005, the Court entered an Order dismissing Defendant Basmajian for failure to serve in accordance with the Federal Rules of Civil Procedure. *See* January 14, 2005 Memorandum Opinion and Order. [Doc. No 59]. In this Order, the Court explained in some detail how Plaintiffs' service did not

comport with the requirements of the Federal Rules of Civil Procedure.

Plaintiffs filed a motion to vacate or reconsider this decision. *See* Plaintiffs [sic] Motion to Vacate or to Reconsider Decision Granting in Part Defendant Basmajian [sic] Motion to Dismiss, filed January 26, 2005, [Doc. No. 62]. The Court found that Plaintiffs' motion was unsupported and without basis. In its Opinion, the Court noted that in addition to not understanding how to effectuate service, Mr. Bello clearly misunderstood or misinterpreted several other Federal Rules of Civil Procedure. For example, Mr. Bello asserted that a document was timely filed with the Court if it was placed in the mail on the day it is required to be filed and indicated that he calculated the date a response was due based on the day he actually received the opening brief in the mail. After attempting to correct these misinterpretations, the Court expressed its concern that Mr. Bello's misunderstanding of the Federal Rules of Civil Procedure was jeopardizing Plaintiffs' case:

> The Court is concerned that Plaintiffs' counsel's fundamental misunderstanding of, or lack of familiarity with, the Federal Rules of Civil Procedure and the Court's local rules, is jeopardizing Plaintiffs' case. The Court, therefore, will require Plaintiffs' counsel to read the Federal Rules of Civil Procedure and the Local Civil Rules of the United States District Court for the District of New Mexico within ten days of the date of this Order. The Court will also require Plaintiffs'

> counsel to certify that he has provided Plaintiffs with a copy of this Memorandum Opinion and Order.

June 21, 2005 Memorandum Opinion and Order [Doc. No. 172] (internal footnote omitted).

Despite having no legal basis to challenge the Court's ruling, Plaintiffs filed a Writ of Mandamus seeking to have the Tenth Circuit direct this Court to enter a default judgment against Defendant Basmajian. This request was denied by the Tenth Circuit. April 5, 2005 Order [Doc. No. 128].

Third, compounding Plaintiffs' counsel's unfamiliarity with federal procedure and law is his ongoing and apparently intentional practice of misfiling legal precedent. Defendants contend that Plaintiffs' filings contain "unjustified legal contentions," "ignore favorable precedent," and "show a lack of familiarity with the law." This Court has reviewed the examples of miscitations mentioned in Defendant Wells Fargo's brief and found that Plaintiffs repeatedly cite cases for propositions for which they do not stand. As a single example, among many, Plaintiffs asserted that "[i]t is well settled that service, or notice of suit served on the attorneys for the Defendant is sufficient. *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999)." Plaintiffs [sic] Responses and Objections to Defendant Basmajian T. Doyle Motion to Dismiss, filed November 4, 2004, [Doc. No. 42], at p. 2. *Murphy Brothers,* however, addressed a question regarding commencement of the thirty-day time

period for removal, and does not address service on attorneys.

While an occasional incorrect citation may be inadvertent, the number of incorrect citations in Plaintiffs' filings can only be interpreted as a deliberate attempt to mislead the Court and the parties, to cause unnecessary delay, and to needlessly increase the costs of litigation.

DISCUSSION

I. Sanctions for Discovery Violations

Defendants seek sanctions, including dismissal, for discovery abuses pursuant to Rule 37 of the Federal Rules of Civil Procedure. It is well-established that a district court has discretion to dismiss a case for discovery violations. Because dismissal is such a harsh sanction, however, it is appropriate only in cases of "'willfulness, bad faith, or [some] fault" of the party. *Archibeque v. Atchison, Topeka & Santa Fe Ry. Co.*, 70 F.3d 1172, 1174 (10th Cir. 1995) (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640, 96 S.Ct. 2778, 2779, 49 L. Ed.2d 747 (1976)). Before choosing the sanction of dismissal, the district court must consider (1) the amount of actual prejudice to the opposing party, (2) the degree of interference with the judicial process, (3) the litigant's culpability, (4) whether the litigant was warned in advance that dismissal was a likely

sanction, and (5) whether a lesser sanction would be effective. *Ehrenhaus v. Reynolds,* 965 F.2d 916, 921 (10th Cir.1992). "It is within a court's discretion to dismiss a case if, after considering all the relevant factors, it concludes that dismissal alone would satisfy the interests of justice." *Ehrenhaus v. Reynolds,* 965 F.2d 916, 918 (10th Cir.1992).

A. The Amount of Actual Prejudice to the Opposing Party

There is no question that Defendants have been prejudiced by Plaintiffs' conduct in this case. From the beginning, Plaintiffs' conduct has obstructed the orderly progression of this case. For the first time in the Magistrate Judge's tenure on the bench, the parties in a case were unable to agree on anything for inclusion in the Proposed Discovery Plan or the Initial Pretrial Report. Plaintiffs filed untimely and incomplete discovery responses, requiring Defendants to file motions to compel every discovery response. Plaintiffs failed to file responses to Defendants' motions to compel, and, once the Magistrate Judge granted the motions to compel and ordered Plaintiffs to file complete responses, ignored the Court's orders. Plaintiffs appeared forty-five minutes late for the initial Rule 16 conference and failed to appear for their depositions. As a result, nearly two years and over two hundred docket entries later, Defendants are no closer to understanding the basis for Plaintiffs' claims than they were when the claims were filed.

B. The Degree of Interference With the Judicial Process

This case has consumed an inordinate amount of judicial time. Initially, the Court thought the difficulties in the case were attributable to Plaintiffs' counsel's lack of familiarity with federal rules and procedure and attempted to educate Mr. Bello by explaining its rulings in great detail and requiring that Mr. Bello read the local rules and the Federal Rules of Civil Procedure. It quickly became apparent, however, that the difficulty in the case was not ignorance but a deliberate attempt by Plaintiffs to obstruct the orderly progression of this case.

The Court cannot recall another case in which a party has so obstructed the course of the judicial proceedings that nearly two years into the case the parties are no closer to a decision on the merits than when the case was filed. This case has taken an inordinate amount of judicial resources, with little, if any, progress toward resolution. The Court agrees with the Magistrate Judge's conclusion that Plaintiffs' actions have substantially interfered with the judicial process to the detriment of the parties and the Court. In fact, it is hard to imagine how a party could be more obstructive.

Mr. Bello characterizes his conduct as zealous representation. Zealous representation, however, is conducted within the confines of ethical behavior and the Federal Rules of Civil Procedure. Mr. Bello's representation consists of ignoring established law,

disregarding Court rules, refusing to comply with Court orders, refusing to accept rulings by the Court, taking frivolous appeals, making frivolous arguments, filing false certificates of service, attacking the Court and opposing counsel, and making blatant misrepresentations to the Court. No reasonable person could characterize Mr. Bello's conduct as zealous representation.

C. The Litigant's Culpability

As discussed above, it is clear that Plaintiffs' conduct in this case is not the result of inadvertence or neglect. Rather, Plaintiffs have intentionally and willfully set upon an obstructionist course, wholly disregarding their obligations under the Federal Rules of Civil Procedure.

While Mr. Bello is the person who directed the course taken by Plaintiffs, a litigant is bound by the actions of its attorney, and the relative innocence of the litigant in the failure does not constitute grounds for relief. As stated by the Tenth Circuit, "[t]hose who act through agents are customarily bound by their agents' mistakes. It is no different when the agent is an attorney. When an attorney drafting a contract omits an important clause, the client who signs the contract is bound. When a trial attorney is poorly prepared to cross-examine an expert witness, the client suffers the consequences. (It should be noted, however, that the mistreated client is not totally without a remedy. There may be a meritorious malpractice claim

against the attorney.)" *Gripe v. City of Enid, Oki.*, 312 F.3d 1184, 1189 (10th Cir. 2002).

In *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), the Supreme Court upheld the district court's inherent power to dismiss an action with prejudice when the plaintiff's attorney, who had a history of dilatory conduct, missed a pretrial conference without an adequate excuse. Justice Harlan wrote:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation; in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.

Id. at 633-34, 82 S.Ct. 1386 (internal quotation marks omitted).

In this case both the Magistrate Judge and the presiding judge took steps to ensure that Plaintiffs were aware of the gravity of the situation resulting from their chosen counsel's litigation tactics. Both judges required Mr. Bello to provide copies of their orders warning that sanctions may be imposed to

Plaintiffs. The Magistrate Judge also required Plaintiffs to attend the Sanctions Hearing. Despite the warnings that Mr. Bello's actions may result in the dismissal of their case, Plaintiffs continued to employ Mr. Bello as their representative.

D. Whether the Litigant was Warned in Advance that Dismissal was a Likely Sanction

Plaintiffs were warned numerous times that sanctions, including dismissal, may be imposed if they continued to disregard discovery obligations, make frivolous arguments, and disregard Court orders. *See, e.g.,* March 2, 2005 Memorandum Opinion and Order, [Doc. No. 81] ("Plaintiff's counsel shall file a certification that he delivered a copy of this Memorandum Opinion and Order to his clients and fully discussed with them the issues addressed herein, especially the possibility of sanctions including dismissal with prejudice if they knowingly and willfully fail to comply with the orders of the Court and its rules."; June 21, 2003 Memorandum Opinion and Order, [Doc. No. 1721 ("Plaintiffs are hereby cautioned that frivolous arguments may subject Plaintiffs and/or their counsel to Rule 11 sanctions."); Notice of Hearing, filed June 24, 2005. [Doc. No. 181], ("Plaintiffs as well as their counsel and all defense counsel are ordered to appear in person and show cause why sanctions, including possible dismissal of the action, should not be imposed pursuant to Fed. R. Civ. P. 11 & 37 and 28 U.S.C. § 1927.").

E. Whether a Lesser Sanction Would be Effective

The Court does not believe a lesser sanction would he effective. This is not a case where a few isolated violations have occurred and a party has taken responsibility for the violations.

Rather, Plaintiffs have shown a pattern and practice of disregarding Court orders, their discovery obligations and applicable rules. Further, Plaintiffs do not acknowledge any of these failures but, instead, resort to baseless attacks upon opposing counsel and the Court. Given the number and degree of violations Plaintiffs have committed and the lack of any indication that Plaintiffs intend to change course, a lesser sanction does not appear effective.

The Court agrees with the Magistrate Judge that, after considering all the relevant factors, dismissal alone would satisfy the interests of justice. For the reasons set forth in the Magistrate Judge's Proposed Findings and Recommended Disposition, as modified above, the Court will dismiss this case pursuant to Rule 37 for numerous and persistent discovery violations.

II. Sanctions Pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927

Defendants also request monetary and other sanctions against Mr. Bello personally pursuant to Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. The Court may impose sanctions on

an attorney if he presents a pleading, written motion, or other paper for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Fed. R. Civ. P. 11(b)(1). Additionally, the Court may impose sanctions on an attorney if the claims, defenses, or other legal contentions made in a pleadings written motion, or other paper are not warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law. Fed. R. Civ. P. 11(b)(2). Similarly, 28 U.S.C. § 1927 authorizes the Court to require an attorney who unreasonably and vexatiously multiplies the proceedings in any case to personally pay the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct. 28 U.S.C. § 1927.

Like the Magistrate Judge, the Court is convinced that Mr. Bello's conduct violated Rule 11 and unreasonably and vexatiously multiplied the proceedings in this case pursuant to 28 U.S.C. § 1927. Mr. Bello mailed documents up to a week after he certified they were served. A certificate of service is critical because that is the date that the time for filing a response runs. By not mailing his documents until days after he certified they were mailed, Mr. Bello reduced the amount of time Defendants had to respond. Signing a false certificate of service constitutes an inaccurate representation to the Court in violation of Rule 11(b).

Mr. Bello also repeatedly miscited cases in his briefs and motions. As noted by the Magistrate Judge,

a few inaccurate citations may be innocent and not intended to mislead the Court or opposing counsel but a pattern of misrepresentations suggests a conscious decision to misrepresent the law. Such misrepresentations needlessly delay and increase the costs of litigation.

In addition, Mr. Bello objected to every ruling made by the Magistrate Judge, filed "objections" or motions to reconsider on nearly every ruling made by the Court, and took two frivolous appeals to the Tenth Circuit. Due to the lack of any legal or factual support for most of these filings, the Court can only construe Mr. Bello's actions as intended to unnecessarily delay or needlessly increase the cost of the litigation.

The Court agrees with the Magistrate Judge that monetary sanctions against Mr. Bello personally are warranted under Rule 11 and 28 U.S.C. § 1927. Defendants have requested, in part, that a $5000.00 monetary penalty be imposed against Mr. Bello and that they be awarded their attorney fees and costs for filing their motion for sanctions and attending the hearing, and their attorney fees, costs and expenses incurred as a result of the unreasonable and vexatious conduct of Mr. Bello. The Magistrate Judge recommended that monetary sanctions be imposed against Mr. Bello personally in the amount requested by Defendants in their motion for sanctions."[8] The

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[8] The Magistrate Judge also recommended that this Court consider forwarding a copy of this Opinion to the New Mexico

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Court agrees with the Magistrate Judge that a $5000.00 monetary penalty payable to Defendants is necessary to partially compensate Defendants for the excess costs, expenses, and attorneys' fees reasonably incurred due to Mr. Bello's conduct and for effective deterrence. Due to the additional sanctions imposed under Rule 37, the Court will not award any additional attorney's fees and costs.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant Fairbanks' requests for sanctions and attorney fees in their discovery motion filed March 8, 2005, **[Doc. No. 86]**; Defendant Accredited Home Lenders, Inc.'s Motion for Order to Show Cause and Contempt, filed April 13, 2005, **[Doc. No. 131]**; Defendants Fairbanks and Wells Fargo's Motion for Discovery Sanctions, filed June 20, 2005, **[Doc. No. 152]**; Defendant Accredited Home Lenders, Inc.'s Motion for Discovery Sanctions, filed June 23, 2005, **[Doc. No. 175]** are **GRANTED in part**. This case is hereby dismissed with prejudice as a sanction pursuant to Federal Rule of Civil Procedure 37 for discovery violations.

Disciplinary Board. Subsequent to the Magistrate Judge's recommendation, an order was entered requiring Mr. Bello to show cause why his federal bar privileges should not be revoked. This Court will defer the question of whether the New Mexico Disciplinary Board should be notified to the three judge panel holding the show cause hearing.

IT IS FURTHER ORDERED that Defendant Fairbanks and Wells Fargo's Motion for Sanction, filed April 1, 2005, **[Doc. No. 117]**, is **GRANTED in part**. Monetary sanctions in the amount of $5000 are hereby imposed against Mr. Bello personally pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927. This amount shall be paid in equal amounts to Defendant Wells Fargo and Defendant Fairbanks within sixty days of the date of this Order. 1n all other respects, the motion is denied.

IT IS FINALLY ORDERED that Plaintiffs' Motion to Quash the Subpoenas, filed June 16, 2005, **[Doc. No. 150]** and Plaintiffs' Motion for Stay of All Further Proceedings, filed October 11, 2005, **[Doc. No. 214]**, are **DENIED** as moot.

Dated this 2nd day of March, 2006.

/s/ Martha Vazquez
MARTHA VAZQUEZ
U.S. DISTRICT
COURT JUDGE

Attorney for Plaintiffs:
Mike Bello, Esq.

Attorneys for Defendants:
Cynthia Tessman, Esq.
Dylan O'Reilly, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JAMES AND
RACHEL DRAIN,

Plaintiffs,

v. CIV 04-399 MV/KBM

WELLS FARGO BANK,
MINNESOTA, NA, et al.,

Defendants.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

As an initial matter, I need to address the procedural posture of this case before addressing the pending motions. On October 4, 2005, Plaintiffs filed a Notice of Appeal to the Tenth Circuit seeking reversal of my August 31, 2005 discovery rulings. *See Docs. 207 & 213.* Plaintiffs also then filed a motion addressed to the presiding judge to stay my rulings. Since that time, however, the Tenth Circuit dismissed the appeal for lack of appellate jurisdiction. *See Doc. 219* (Order entered October 27, 2005). Thus, the motion to stay now appears moot, and I feel confident I have the requisite authority to now issue my recommended findings and disposition to Chief District Judge Vázquez.

On August 11, 2005, I held a hearing on numerous pending motions. *See Transcript,* filed November 18, 2005. Present at the hearing were Plaintiffs

James and Rachel Drain and their attorney Gany Mike Bello, Dylan O'Reilly and Kelsey Green for Defendant Wells Fargo and Fairbanks Capital, and William Davis and Cynthia Tessman for Defendant Accredited Home Lenders. Specifically, the parties were given notice that I would hear the following motions seeking sanctions that were previously taken under advisement: Defendant Fairbanks' motions seeking attorney fees *(Dots. 86 & 87),* a motion to strike pleadings filed by Defendants Fairbanks and Wells Fargo *(Doc. 117),* and Defendant AHL's motion for order to show cause and contempt *(Doc. 131).*

Plaintiffs maintain that "they were ambushed, prejudiced and wrongfully surprised" because "their appearance was noticed for a hearing on only a Motion to compel disclosure of their Medical Record. . . ." *See Doc. 208* at 3. To the contrary, the notice specifically provided:

> A hearing on ***motions requesting sanctions (Doc. 86, 87, 117 & 131)*** has been set in the above matter on MONDAY, JULY 25, 2005, at 9:00 a.m. at the United States Courthouse, 200 E. Griggs Ave., Third Floor, Courtroom Two, Las Cruces, New Mexico. As ordered in the Proposed Findings and Recommended Disposition and Order on Certain Pending Motions filed on June 17, 2005 by Magistrate Judge Karen B. Molten, **"Plaintiffs as well as their counsel and all defense counsel are ordered to appear in person and show cause why sanctions,**

> **including possible dismissal of the action, should not be imposed pursuant to FED. R. CIV. P. 11 & 37 and 28 U.S.C. § 1927."**

See Doc. 181 (emphasis added); see *also Doc. 189* (resetting hearing for August 11, 2005). Thus, Plaintiff were given adequate notice that the imposition of sanctions was under consideration.

Moreover, two additional motions filed by Defendants Fairbanks and Wells Fargo *(Doc. 152)* and by Defendant AHL *(Doc. 175)* seeking dismissal as a sanction became ready for ruling prior to the hearing. *See* Notices of Completion. *Docs. 192 & 198.* Therefore, I also permitted evidence to be received and heard argument on those motions at the hearing. Plaintiffs were given an opportunity to file a response by August 26, 2005 to certain envelopes which were admitted into evidence. Plaintiffs' "Objections and Responses" were filed August 31, 2005. *Doc. 208.*

Insofar as Plaintiffs in their "Objections and Responses" renew their motion that I recuse, it will yet again be denied. I reject Plaintiffs' continuing, unfounded assertions of judicial bias and the alleged "use of the [Magistrate Judge] office as an extension of ones [sic] personal effects." *Doc. 208* at 2. At the hearing in response to Plaintiffs' Motion to Recuse *(Doc. 203)* and in a previous Order *(Doc. 186),* I answered Plaintiffs' attacks with my belief that

> I have simply correctly applied the applicable law to the facts, and I have provided the

> parties with my rationale and citations to authorities upon which I have relied. As the Tenth Circuit noted, "adverse rulings cannot in themselves form the appropriate grounds for disqualification." *Green v. Darrell,* 969 F.2d 915, 919 (10th Cir. 1992). . . . I will not repeat the other bald and unsubstantiated accusations leveled against me, the defendants' attorneys and the presiding judge. I will simply reply that I find them to be lacking in a factual predicate. . . ." There is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is. **A judge should not recuse himself on unsupported, irrational, or highly tenuous speculation.**" *Hinman v. Rogers,* 831 F.2d 937, 939 (10th Cir. 1987) (citations omitted).

Doc. 194 at 2-4. Thus, although it is tempting to pass along this most trying case to another judge, I respectfully refuse to recuse.

Proposed Findings of Fact

Pursuant to Chief Judge Vazquez' Order of Referral under 28 U.S.C. § 636(b)(1)(B), I make the following proposed findings of fact as to Plaintiffs' and their counsel's conduct based upon the court record[1] and the evidence received at the hearing.

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[1] Plaintiffs have objected to judicial notice of our court's record in the *Wheeler* case, and they maintain that information

(Continued on following page)

Failure to Provide Discovery

Initial Rule 16 Disclosures. At the hearing held December 14, 2004, I ordered Plaintiffs who had not yet made timely initial disclosures to do so by December 22, 2004. *Doc. 61.* I specifically directed Mr. Bello that because Plaintiffs sought damages for emotional injuries, he was to provide Defendants by that same date with HIPPA-compliant releases pursuant to D.N.M.LR.-Civ. 26.3(d). *Id.*

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gleaned from the *Wheeler* court file constitutes "extra-judicial" information. Admittedly there can be potential problems in taking judicial notice of court records, and "[f]actual findings in one case ordinarily are not admissible for their truth in another case through judicial notice." *Wyatt v. Terhune,* 315 F.3d 1108, 1114 (9th Cir. 2003).

However, "courts should distinguish between taking judicial notice of the truth of some extrajudicial fact recited in a court record and the use of those facts for some purpose that does not depend on the truth of the facts recited." 21 Charles Alan Wright & Kenneth A. Graham, Jr., *Federal Practice & Procedure* § 5106 (Supp. 2001). In the action at bar, I have taken judicial notice of the *Wheeler* pleadings, opinions and orders not for the truth of the propositions contained therein. Rather, I have used them to demonstrate a similar obstructionist course of conduct by Plaintiffs counsel and to ascertain that his conduct here is not the result of inexperience, accident or other innocent reason. Further, the *Wheeler* court records establish that Mr. Bello had prior "notice" that failure to comply with D.N.M.LR-Civ. 26.3(d) in a case with similar claims could result in the imposition of sanctions including dismissal of the action. I believe that for this purpose, "[a] court may take judicial notice of related proceedings and records in cases before the same court." *MacMillan Bloedel Ltd. v. Flintkote Co.,* 760 F.2d 580, 587 (5th Cir. 1985).

Although Mr. Bello certified that he had timely mailed the required disclosures, Defendants were forced to file motions to compel because, in fact, Plaintiffs had not provided the information and releases mandated by D.N.M.LR-Civ. 26.3(d). *See Docs. 60 & 73.* On March 2, 2005, I granted Defendant AHL's motion to compel and ordered that

> (1) . . . . Plaintiff shall immediately and fully provide Defendant AHL with the medical information, medical records and HIPA compliant form medical release as required by D.N.M.LR-Civ. 26.3 to support the claims pertaining to Plaintiffs' alleged emotional injuries; (2) The Court will take under advisement Defendant AHL's request for attorney fees. If Plaintiffs do not provide the disclosures identified above by March 16, 2005, the Court will issue an order to show cause why the request for attorney fees should not be granted, and to explore whether further sanctions, including possible dismissal of the action, are required to assure compliance with the rules and orders of this district court. *See Ehrenhaus v. Reynolds,* 965 F.2d 916, 920 (10th Cir. 1992); and (3) Plaintiffs' counsel shall file a certification that he delivered a copy of this Memorandum Opinion and Order to his clients and fully discussed with them the issues addressed herein, especially the possibility of sanctions including dismissal with prejudice if they knowingly and willfully fail to comply with the orders of the Court and its rules.

Doc. 81 at 5. Plaintiffs filed objections to the above discovery ruling as contemplated by 28 U.S.C. § 636(b)(1)(A),[6] but did not seek a stay of my ruling.[7] Instead, on the day the disclosures were due under my order, Plaintiffs filed a motion for protective order requesting that the

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[6] A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

FED. R. CIV. P. 72(a).

[7] In the *Wheeler* case, Chief Magistrate Judge Garcia was faced with the same situation:

> Subsequent to the Court's issuance of its Memorandum Opinion and Order directing compliance with discovery obligations and imposing sanctions, Wheeler timely filed objections to the magistrate's order [Doc. 36]. Wheeler's objections are pending before the Honorable William P. Johnson, the trial judge. However, Wheeler did not obtain a stay of the magistrate's order. ***The filing of objections does not serve to stay the effect of the Court's order.***

Wheeler v. American Heritage Bank, CIV 04-271 WJ/LFG, *Doc. 49* at 2-3 (D.N.M. October 6, 2004) (citations omitted) (emphasis added).

March 2, 2005 order be vacated. On July 29, 2005, Chief Judge Vázquez denied the motion for protective order. *See Doc. 196-97.*

Despite these rulings against them, Plaintiffs have willfully failed to provide the medical information and releases to the Defendants. At the August 11, 2005 hearing, Mr. Bello stated that

> now that the Court has — I mean, the Chief Vázquez has made the final ruling on it that is specific to the claim rather than the broad medical history of my clients for the past five years are specific to their claim that those – that she – that the Court finds that those medical information that we have should be provided, and we will produce those.

Transcript at 44. Yet within a minute, Mr. Bello proclaimed that in response to Chief Judge Vázquez' order, that "there is no medical information that we have that we are withholding," *id.* at 45, and that "[w]hatever [Plaintiffs] have concerning how they deal with stress will be used – or that may be used as evidences towards their emotional claim, we will produce ***those*** records," *id.* at 48 (emphasis added).

In essence, Mr. Bello suggested that Plaintiffs would consider providing limited information and releases for what he deemed qualified as relevant. In short, this "offer" is far too little, far too late and provides no real assurance that the necessary mandated disclosures would be forthcoming without delay. Indeed, in Plaintiffs' most recently filed Objections and

Responses, Plaintiffs seem to rely on the pending appeal on the same issue in the *Wheeler* case[8] as insulating them from sanctions for non-compliance with D.N.M.LR-Civ. 26.3(d) in this action. *See Doc. 208* at 3.

Other Written Discovery Requests. Plaintiffs also failed to serve complete and timely responses to Defendants' discovery requests, including interrogatories, requests for production and requests for admissions. The docket sheet reflects that Defendants had to file motions to compel virtually every discovery request. Yet Plaintiffs failed to file timely responses in opposition to the vast majority of the motions to compel, *see Doc. 207,* which failure "constitutes consent to grant the motion" under D.N.M.LR-Civ. 7(b). In granting Defendants' motions to compel, I expressly found that Plaintiffs waived any objection to fully and completely answering or responding to the discovery requests and ordered prompt service of full responses without objections. Plaintiffs have failed to so comply. *See Transcript* at 51-55.

Failure to Appear for Depositions. Defense counsel had been diligently trying to work with Mr. Bello over a two-month period to find an acceptable date to depose the Drains, but to no avail. *See Doc. 153.* With the discovery deadline looming, and having heard no response from Mr. Bello to requests for

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[8] *Wheeler v. American Heritage Bank* (No. 04-2251 in the Tenth Circuit).

available dates, Defendants noticed Plaintiffs' depositions for May 26 and 27, 2005. Mr. Bello then informed defense counsel that those dates were "in conflict" with his schedule. Mr. Bello advised, however, that "the week of May 30, 2005 thru June 2, 2005 is available and could be worked out on further consultation for a definite confirmation." *Doc. 153,* Exh. 6. Therefore, Defendants amended their deposition notices for June 1 and 2, 2005. *Id.* at Exh. 7-10.[9]

A certified mail return receipt indicates that the amended deposition notices were received by Michael Morales on May 17, 2005, and Mr. Bello acknowledges that Mr. Morales is authorized to accept mail on his behalf. *See id.* at Exh. 8; *Transcript* at 115. Yet, ten days after receiving the notice of depositions, Mr. Bello faxed a letter stating that he had not received word about the final scheduling of the depositions, and that his clients were no longer available for deposition on those dates that he had previously provided to defendants' attorneys. Plaintiffs did not seek a protective order nor did they file a notice of nonappearance. Although the depositions were clearly noticed in a timely manner, Plaintiffs failed to appear for their depositions. *See Doc. 152 & 175.*

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[9] To make it easier for both Plaintiffs and their attorney, Defendants noticed the depositions for Clovis even though they could have insisted that the depositions take place in Albuquerque. *Id.*

Mr. Bello apparently contends that his clients were not obligated to appear on the dates set forth in the amended notices because these dates were not "confirmed" in his mind. *Transcript* at 119-20. Clearly, however, the amended notices served to finalize the dates defense counsel had already indicated he was planning to use. *See Doc. 153*, Exh. 7. Plaintiffs further complain of certain conduct of defendants' attorneys in association with those deposition attempts:

> when defense counsel was in Clovis for depositions of Plaintiffs and neither Mr. Bello nor his clients appeared at those depositions, defense counsel decided to hand deliver documents to Mr. Bello's office address. Defense counsel went to the street address Mr. Bello had claimed to be his [Clovis] office's street address, but discovered it was a private mailbox facility and not Mr. Bello's office. Defense counsel inquired about leaving a package for Mr. Bello and then did so.

Doc. 11 at 5. Mr. Bello contends that this visit to his Clovis address constitutes "unethical and unlawful action." *See Doc. 208* at 7. To the contrary, hand-delivering a package to an opposing counsel's listed address is not only permissible but commonplace, and it provides counsel with the ability to request a receipt when mailing dates are at issue.

Conduct of Mr. Bello

Erroneous Certification Dates. The exhibits offered and admitted at the hearing include numerous examples of what appear to be inaccurate mailing certifications by Mr. Bello.[10] *See Exhs. A-0.* The salient information from the exhibits received at the hearing is set forth in the chart below:

Exh	*Title of enclosed document*	*Certification*	*Postmark*	*?*
A	Plaintiff's Responses and Objections to Defendant Basmajian T. Doyle Motion to Dismiss	11/04/04	11/09/04	5
B	Plaintiff's Motion to Set Aside Entry of Default on Defendant's Counterclaim	12/01/04	12/07/04	6
C	P's Motion to Vacate or Reconsider Decision Granting in Part Basmajian's M to Dismiss	01/24/05	01/25/05	2

[10] Mr. Bellow protests that he was "ambushed" by these exhibits. To make sure that he had sufficient time to examine the exhibits and offer any objections, I allowed Plaintiffs to file written objections to the envelope/certification testimony and evidence after its receipt at the hearing, and they have done so. *See Doc. 208.*

D	P's Response & Obj'ns to AHL's Motion to Compel Medical History Disclosures	01/27/05	01/28/05	1
E	P's Reply on Motion to Vacate or to Reconsider Order	02/24/05	02/26/05	2
F	P's Obj'ns to Judge Molzen's Recommended Finding as to P's M to Set Aside Default	06/27/05	07/05/05	8
G	P's Request for Disclosure under U.S.C. § 455 to Judge Molzen & to the Court	06/29/05	07/07/05	8
H	P's Certification of Completion of Task and Presentation of Order	07/01/05	07/08/05	7
I	Same as Exhibit C (received by Def. AHL)	01/24/05	01/25/05	1
J	P's Second Set of Interrogatories to Defendants Wells Fargo & Fairbanks	02/24/05	03/??/05	4
K	P's Response & Obj'ns to AHL's M to Require Only Written Communication	03/11/05	03/15/05	4

L	P's Motion for Protective Order	03/14/05	03/16/05	2
M	P's Obj'ns to Judge Molzen Opinion and Order Granting Motion to Compel	03/09/05	03/14/05	5
N	P's Answers & Obj'ns to Defendants to Wells Fargo and Fairbanks Counterclaim	12/01/04	12/07/05	6
O	P's Response & Obj'ns to AHL's M to Dismiss, or in alternative, M for More Def Stmt	08/09/04	08/13/04	4

As seen from the chart the postmarks on these exhibits reflect that Plaintiffs' actual mailing dates were days after the indicated mailing date set forth in the certifications. Mr. Bello maintains that these discrepancies amount to no big deal, and as to those which show just a one or two day delay in the postmark, I agree. *See Exhs. C, D, I & L.* Interoffice procedures, such as placing the document in a secretary's in-box could explain such a short delay. But when the postmark date differs from the certification date by ***four to eight days***, the delay in mailing significantly reduces the amount of time available for Defendants to file timely responses. *See Exhs. A, B, E, F, G, H, J, K, M, N & O.*

Mr. Bello protests that there are no assurances that Defendants have accurately kept track of which

documents were sent in each envelope and when they were actually mailed or received. However, Defendants' counsel testified as to her instructions to her office staff regarding such correspondence, and Plaintiffs offered no proof to the contrary. Plaintiffs then condemn opposing counsels' decisions to closely monitor the receipt of correspondence and to retain envelopes in which Plaintiffs had mailed documents. Plaintiffs attach some sort of sinister motive for doing so and allege "bad faith." *See Doc. 208* at 4; *Transcript* at 101-05. Plaintiffs further declare that the documents and authenticating testimony were "bogus, deliberately orchestrated to deliver injustice and to obtain an unlawful sanction," and "unethical maneuvers of process." *Doc. 208* at 6.

Other than pure speculation, however, Plaintiffs failed to refute the testimony. The authenticating witnesses were subject to cross-examination at the hearing. Moreover, Mr. Bello was given the opportunity, if he wished, to take the stand and testify regarding his office's mailing practices and certification procedure. He declined. Instead, Mr. Bello has now filed two affidavits in "rebuttal." *See Exhibits to Doc. 208.*

In one affidavit, Mike Moralez states that he is an "independent contractor and owner of the Pack & Mail business in Clovis" and that he is "in the business of shipping, receiving and packaging and maintaining [illegible] for individuals and businesses, including several law offices and attorneys here in Clovis." *Doc. 208* at Exh. B. Moralez further testifies

that he handles Mr. Bello's mailings, but Moralez gives absolutely no information regarding how such mail is handled. In fact, the affidavit is devoid of any explanation for the discrepancies between the postmark and certification dates. It appears that Plaintiffs offer the Moralez Affidavit solely to protest opposing counsel's alleged "deceptive" and "unethical" visit to Mr. Bello's mailing address of record in Clovis. As discussed above, these arguments are without merit.

Plaintiffs declare that Mr. Bello's affidavit "states that all the documents he served were delivered to the mail and or put in the mail on the dates stated on the certificate of service." *Doc. 208* at 7. Mr. Bello's affidavit says no such thing it is, in fact, a truly empty affidavit. Mr. Bello testifies only that he is "the attorney for Appellant [sic]," that he is "of sound mind and above the age of 21 years old," and that those statements are "true and correct to my knowledge" and that they were "made for the purpose of justice and not for delay." *Doc. 208* at Exh. A.

In short, Mr. Bello's affidavit provides absolutely no material information on the issue at hand. His misrepresentation of the contents of his affidavit again demonstrates Mr. Bello's lack of candor with the Court in these proceedings.

Insofar as Plaintiffs attempt to attack the purported contents of Defendants' exhibits, I find those objections to be without merit. *See Doc. 208* at 5-6.

Defendants laid a proper foundation for their introduction, and the exhibits were properly authenticated. Plaintiffs merely speculate that the envelopes might have contained documents other than those indicated by Defendants. Having heard sworn testimony as to each envelope's contents, and I find it to be credible.

As to the alleged incorrect certifications, I will assume that the discrepancy in dates as to Exhibit O, which shows an incorrect zip code for defense counsel, could be explained if the envelope contained a second complimentary copy at counsel's request. However, contrary to Mr. Bello's other assertions: (1) Exh. J's postmark is not totally unreadable – although the day of mailing is obscured, the month of "March" clearly appears; (2) the postmark on Exhibit K is March 15, 2005 and not March 5; and (3) his hypothesized explanations as to discrepancies found in Exhibits L-N were flatly contradicted by the testimony of defense counsel.

Thus, I find that the exhibits are substantially what Defendants purport them to be. Based upon those admitted exhibits and the received testimony, I further find that they establish a pattern and practice by Mr. Bello of falsely certifying the actual date of mailing.

Other Alleged Misrepresentations. Defendants contend that Plaintiffs' pleadings are laden with "unjustified legal contentions" that "ignore unfavorable precedent" and "show a lack of familiarity with the

law." *Doc. 117* at 2-7 (referring to numerous citations within Plaintiffs briefing). Indeed, even a cursory review indicates support for that proposition.[11]

Blatant Disregard of Court Orders. Early in the litigation Defendants alerted the Court of discrepancies in the postmark date and certification of service date of Plaintiffs' pleadings. In order to avoid what I saw as a rapidly deteriorating situation, at the initial Rule 16 hearing held December 14, 2004, I ordered counsel "in this case only, to make service of all pleadings by certified mail." *See Doc. 54.* I wanted a reliable record of when and how service was accomplished.

But Plaintiffs ignored my attempt to protect them from any further accusations of incorrect certification dates. If Mr. Bello had used certified mail as I had ordered, there would be independent proof of all mailing dates. By failing to follow this directive, Plaintiffs reintroduced the issue of false certifications which has necessarily diverted the attention of the court to collateral matters unrelated to the merits of this action. Plaintiffs have thereby obstructed the speedy and orderly processing of this case.

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[11] Rather than go into great detail here, I have scrutinized the examples mentioned in Defendant Wells Fargo's brief and find that Defendants have accurately portrayed the holdings of the cases and how they differ from the propositions for which Plaintiffs have cited them. *See id.*

Although of lesser importance, Plaintiffs have failed to appear in a timely manner. On December 14, 2004, Mr. Bello arrived almost forty-five minutes late for the Initial Rule 16 Hearing. *See Doc. 54.* He indicated that he had thought the hearing would be telephonic although the notice clearly indicated it would be held at the courthouse in Las Cruces. *See Docs. 29 & 30.* Just one month later, Mr. Bello and his clients arrived more than an hour and fifteen minutes late for a settlement conference in Las Cruces on January 18, 2005. *See Docs. 56 & 61.* At that time, I cautioned Plaintiffs and their attorney that further failures to strictly abide by court orders could result in the imposition of sanctions. *Doc. 61.*

Frivolous Arguments. Twice Plaintiffs unsuccessfully asked the Clerk of Court to enter default against Defendant Basmajian Thomas Doyle. *See Docs. 31 & 43.* However, Plaintiffs had not properly served Defendant Doyle, and eventually the claims against him individually were dismissed without prejudice. *See Doc. 59.*

Plaintiffs then filed a Petition for Writ of Mandamus in the Tenth Circuit seeking an order directing the district court to enter such a default judgment. The Tenth Circuit panel denied the writ on April 5, 2005. *See Docs. 128.* Plaintiffs now argue that their application for a writ was not frivolous because they "have reserved their right on the issue for further review on timing." *Doc. 123* at 2. The Tenth Circuit Order, however, specifically notes that the petition for writ was denied "[b]ecause the Drains can appeal the

district court's failure to enter a default judgment after final judgment in the case. . . ." *Doc. 128.*

Similarly the Tenth Circuit found Plaintiffs' notice of appeal regarding my discovery rulings lacked any basis for appellate jurisdiction. *See Doc. 213* (notice of appeal) and *Doc. 219* (10th Circuit's November 3, 2005 dismissal of appeal). It is manifestly clear that because the discovery order is not a final decision of the District Court, it falls outside the jurisdiction of the appellate court. *See Howard v. Mail-Well Envelope Co.,* 90 F.3d 433, 435-36 (10th Cir. 1996) (a "final decision" ends the litigation on the merits and leaves nothing more for the court to do but execute judgment).

In fact, Mr. Bello was made cognizant of the frivolous nature of the notice of appeal when he filed the same pleading in the earlier *Wheeler* case. After detailing why the notice of appeal was defective and ineffective to invoke appellate jurisdiction, Magistrate Judge Garcia proceeded with the requisite notice to a show cause hearing. *See* CIV 04-271 WJ/LFG, *Doc. 44.* Following this hearing at which neither Wheeler nor Mr. Bello attended, Judge Garcia performed the *Ehrenhaus* analysis and recommended that the case be dismissed with prejudice as a discovery sanction. *Doc. 49.* District Judge Johnson adopted that recommendation. *See* CIV 04-271 WJ/LFG, *Doc. 53.*

Unsupported Inflammatory Allegations. Plaintiffs' pleadings have grown more and more venomous

against the opposing parties and their counsel.[12] Very early on it became apparent that Mr. Bello was making accusations of unprofessional conduct by opposing counsel. Reluctantly, I ordered the parties to communicate only in writing. As I noted,

> Defendants assert that "telephonic and in-person conversations with counsel for the plaintiffs have become increasingly drawn-out and non-productive." *Doc. 75* at 1. Indeed, in my limited interactions with counsel, Plaintiff's attorney seems to feel that even housekeeping matters require a detailed discussion of the merits of his clients' claims. Finally, I agree with Defendants that "[h]aving all communication between opposing counsel will alleviate questions concerning misrepresentations or unprofessionalism, and will help to eliminate any requests to the court to referee any such disputes or hold evidentiary hearings in this regard." *Id.* at 2.

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[12] As Chief Magistrate Judge Garcia noted early in the *Wheeler* case,

> the Court requested cooperation between counsel and noted that the accusations, castigations and demand for sanctions that have now twice been submitted to the Court are improper, do not constitute effective advocacy, and tend to interfere with the cooperative spirit which should be fostered by counsel in civil litigation. An attorney may be a zealous advocate on behalf of a client, but must always act within the bounds of propriety, ethics and professionalism.

Doc. 12 at 4. Unfortunately, Mr. Bello chose to disregard Judge Garcia's words of wisdom both in *Wheeler* and this action.

Doc. 88 at 2. Plaintiffs insisted that an order requiring only written communications would be counterproductive and slow down the litigation process. After conducting the hearing, I am even more convinced that the written communication order was indeed necessary and that it eliminated some of the controversy as to past events. I have never felt compelled to make such an order before, and I hope never to do so again in the future.

Mr. Bello's unfounded claims of bias and unfair treatment by both the presiding judge and the referral magistrate judge seem part and parcel of his litigation strategy in the District of New Mexico. Plaintiffs' pleadings in this matter are replete with baseless speculation that decisions against their positions have been decided on something other than the merits of the arguments. Indeed, in the *Wheeler* case, CIV 04-271 WJ/LFG, virtually identical charges were made against Magistrate Judge Garcia. *See Docs. 8, 13, 42, 46 & 52.* District Judge Johnson found Wheeler's allegations against Judge Garcia be "totally void of merit." *See Doc. 42.* Such groundless assaults on our judicial officers display obvious but unwarranted hostility and a true lack of respect for the justice system.

As the Tenth Circuit noted in a *pro se* case noted,

> Plaintiff's briefs on appeal do little more than attempt to impugn (without basis) the integrity of the district judge. Such writings are intolerable, and we will not tolerate them. "Due to the very nature of the court as

> an institution, it must and does have an inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates. This power is organic, without need of a statute or rule for its definition, and it is necessary to the exercise of all other powers." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 461 (6th Cir. 1993). . . . "This court simply will not allow liberal pleading rules and pro se practice to be a vehicle for abusive documents. Our pro se practice is a shield against the technical requirements of a past age; it is not a sword with which to insult a trial judge."

Garrett v. Selby, (10th Cir. September 21, 2005), *quoting Theriault v. Silber,* 579 F.2d 302, 303 (5th Cir. 1978). Moreover, in the case at bar, the author of the unfounded attacks is not appearing *pro se.* Rather, Mr. Bello is a member of the federal bar sworn to serve as an officer of the court and to abide by the Rules of Professional Conduct adopted by the Supreme Court of the State of New Mexico and "A Lawyer's Creed of Professionalism of the State Bar of New Mexico." *See* D.N.M.LR-Civ. 83.9. Surely status as a member of the bar cannot immunize an attorney from condemnation for similar baseless attacks.

Analysis

Sanctions for Discovery Violations

Defendants first seek sanctions for the discovery abuses pursuant to FED. R. CIV. P. 37, and Defendants

emphasize Plaintiffs' most recent failures to appear for their timely noticed depositions. *See Doc. 152 & 175.* In light of the numerous, willful discovery violations outlined above, sanctions of some kind are ***clearly*** called for in this case. In *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992), the Tenth Circuit set forth a five-factor test for consideration of the appropriate sanction to be imposed: (1) the degree of actual prejudice to the opposing party; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would likely be taken as a sanction for non-compliance; and (5) the efficacy of lesser sanctions. *Id.* at 921.

(1) The Degree of Actual Prejudice to the Opposing Party

Although this action was filed on April 12, 2004, the discovery process has been thwarted at every turn. For instance, for the first time in over six years on the bench, the parties were unable to agree on anything for inclusion in the Proposed Discovery Plan or the Initial Pretrial Report. *See Doc. 65* at 7. Due to endless controversies, the court file now consists of over two hundred filed documents, and still Defendants have not received the information necessary to even investigate the facts underlying Plaintiffs' theories for recovery. Plaintiffs maintain that Defendants have caused the delays in bringing this case to a final resolution. Instead, the record demonstrates

that it is Plaintiffs' counsel who has unreasonably and vexatiously multiplied the proceedings in this case thereby significantly and needlessly increasing the costs of litigation.

(2) The Amount of Interference with the Judicial Process

The Court has never before seen the degree to which Plaintiffs' counsel obstructed the orderly progression through the discovery phase. The judiciary has attempted to enlighten Mr. Bello as to a magistrate judge's authority when the district judge properly makes the referral, but he simply refuses to accept that there is no constitutional bar to such referrals. At every intersection, Plaintiffs have requested a U-turn – Plaintiffs have filed objections to ***every*** ruling I have made, and indeed, to every ruling made by the presiding judge. Thus, for every one step forward, this litigation has taken two steps back.

Plaintiffs' repeated and adamant rejection of rulings of the court have significantly interfered with the orderly progression of this litigation. Even when a judge's rationale has been set forth with clarity in an effort to educate counsel and the parties, Plaintiffs stubbornly cling to their rejected positions rather than learn from past mistakes. For instance, Chief Judge Vazquez carefully set out why Plaintiffs' attempted service on Defendant Basmajian Thomas Doyle was ineffective under the rules of civil procedure. *See Doc. 59.* Plaintiffs nevertheless asked her to

reconsider the "erroneous" decision, *see Doc. 62,* and even sought a writ of mandamus ordering the entry of default against an individual defendant who had not been properly served. *See Doc. 128* (10th Circuit's April 5, 2005 denial of writ).

At the hearing, I felt Mrs. Drain's frustration when she protested that no one has discussed the merits of the plaintiffs' claims even though this case has been pending for almost a year and a half. In fact, I share that frustration. When this case was assigned to Magistrate Judge Leslie C. Smith, he required Plaintiffs to file an amended complaint because the claims and facts as set forth in the original claim were unclear. *See Doc. 10.* When Defendants then moved again for a more definite statement or to dismiss, Judge Smith chose not to delay the litigation any longer. Instead, he stated:

> Mr. Bello represented to the Court on the record, and defendants may rely thereon, that Paragraphs 6 and 7 contain all of the allegations of fraud. ***The Court further finds that the defendants may obtain all of the detail in connection therewith through the disclosure and discovery process.***

Doc. 22 at 1 (emphasis added). By virtue of Plaintiffs' actions in the disclosure and discovery process, however, Defendants have been denied the opportunity to sufficiently clarify and investigate the claims to get this case on to a trial on the merits.

Looking to all the above instances of Plaintiffs' conduct during discovery, I can say without hesitation

that they have substantially interfered with the judicial process to the detriment of not only the parties but the courts. Judges of both the trial and appellate court have had to expend considerable resources to address the unreasonable actions of Plaintiffs' counsel with little success in moving this case through the litigation process.

(3) The Culpability of the Litigant

It has become clear that Plaintiffs' failures to comply with the orders of this court and their discovery obligations are not the result of inadvertence or excusable neglect. Rather, the record establishes a deliberate unwillingness to accept those responsibilities based upon an intransigent belief that the court's reading of rules and laws is erroneous.

As the Drains pointed out at the hearing, they have no legal training and have solely relied on the advice of an attorney who has been empowered by this district to practice before it. Yet Plaintiffs chose not to provide discovery in the face of warnings from the court that to do so could lead to the loss of their cause of action. They nevertheless have embraced Mr. Bello as their agent and must now be held accountable for his actions. That conscious decision by Plaintiffs underpins the culpability finding against them.[13]

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[13] The tragedy is that Plaintiffs will bear the burden resulting from Mr. Bello's advice if they lose this cause of action and their home. If their claims here have validity, their only

(Continued on following page)

(4) Advance warnings of dismissal of the action as a possible sanction

Having reviewed the entire case file, the record reflects that both Chief Judge Vazquez and I have repeated cautioned Plaintiffs regarding the potential for imposing sanctions including dismissal. In an attempt to assure that Mr. Bello's clients were aware of these warnings, both of us have directed that he certify delivery of certain such opinions and orders directly to them. *See e.g., Docs. 81, 103 & 172.* I also required that Plaintiffs personally attend the August 11th hearing so that they would be fully aware of the gravity of the situation. I believe that the court did all it could to caution that dismissal loomed as a possibility if Plaintiffs continued to follow their chosen attorney's advice to comply rule-mandated and court-ordered discovery obligations.

(5) The Efficacy of Lesser Sanctions.

I am at a loss to see how any lesser sanction than dismissal would deter future discovery abuses. As counsel for the plaintiff in the *Wheeler* action, Mr. Bello knew that the failure to comply with D.N.M.LR-Civ. 26.3(d) when emotional injury damages are sought could result in the ultimate penalty of dismissal. Indeed, his client in the *Wheeler* case experienced just that sanction by following Mr. Bello's

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remaining remedy seems to lie in an possible action against him for legal malpractice.

identical advice on the same issue presented here. If that experience did not deter similar behavior in this case, how could any lesser sanction be effective to prevent future violations of such discovery obligations?

Sanction Pursuant to FED R. CIV. P. 11 and 28 U.S.C. § 1927

Defendants further request monetary and other sanctions against Mr. Bello pursuant to FED. R. CIV. P. 11 and 28 U.S.C. § 1927. His misrepresentations of certification dates and of propositions for which cases stand have created overwhelming confusion for the parties and the court. Admittedly a few inaccurate citations may have been innocent and not intended to mislead the court or opposing parties. However, the pattern of misrepresentations leads me to conclude that the vast majority arose from conscious decisions to misrepresent facts or to incorrectly cite cases for propositions for which they do not stand. *See examples listed in Doc. 117.*

The need to painstakingly review opposing counsel's cited authorities in order to accurately ascertain their holdings undoubtedly increased the amount of time and money required to defend. Likewise the court was forced to expend time and resources to arrive at the truth. Such actions by Mr. Bello have unduly prolonged this litigation and have affected my ability to bring this case to a "just, speedy and inexpensive determination." *See* FED. R. CIV. P. 1.

Undeterred, Mr. Bello protests that Defendants "taunted" his clients when at the hearing defense counsel revealed that the fees incurred in defending this action are well over $100,000. *See Doc. 208* at 4. Yet Plaintiffs have offered nothing to rebut Defendants' need to expend such sums in order to respond to Mr. Bello's litigation methods which have unreasonably multiplied these proceedings. Repeatedly Mr. Bello has made the same arguments which had been previously rejected, cited cases for which they do not stand, personally attacked the defendants, their lawyers, and judges of this district with baseless allegations of bias, conflicts of interest, and lack of judicial restraint and integrity.

Defendants have sought the following sanctions pursuant to FED. R. CIV. P. 11:

> strike Plaintiffs' Answer to the Counterclaim; strike the above-mentioned motions and briefs filed by Plaintiffs which impugn the integrity of the Court Clerk or counsel for Wells Fargo and Fairbanks; strike the briefs and motions which incorrectly state existing law; assess monetary sanctions in the amount of $5,000 as a penalty to dissuade Plaintiffs or their counsel from such future conduct; for Defendants' attorney fees and expenses for preparing this motion, a reply if necessary, and for attending the hearing; and attorneys fees, costs and expenses incurred as a result of the unreasonable and vexatious conduct of Plaintiffs' counsel.

Doc. 139 at 9-10. I am not inclined to strike the pleadings as they provide a great deal of the justification for my recommendation for the imposition of severe sanctions.

Clearly potential and actual dismissal of his clients' cases have not deterred Mr. Bello's violations of the rules of discovery. Apparently Mr. Bello requires needs some other form of incentive to adjust his unacceptable conduct not only as to discovery obligations but the dictates of Rule 11 as well. I therefore recommend the imposition of monetary sanctions as requested by Defendants to be paid by Mr. Bello to deter similar behavior in the future.

I cannot stress enough that Mr. Bello's personal attacks against the defendants' attorneys and the court lack any basis in fact. As I read the cold transcript of the most recent hearing, I realize that at times, I could have been more articulate and that some phrases could be misconstrued as insults. Rather I was trying to just state the situation as it truly was when I stated, "Mr. Bello, you don't understand the rules." *Transcript* at 121. Likewise, I told Mr. Drain that "your attorney doesn't make sense. The arguments he makes don't hold water." *Transcript* at 127. Unfortunately, as can be seen by my comments, the truth sometimes hurts.

Such comments should not be seen as support for Mr. Bello's allegations of judicial bias, however.

> Nor do the complained-about judicial comments support recusal. Opinions formed by a

judge based on facts introduced or events occurring during legal proceedings ordinarily do not support recusal. . . . In *Liteky,* the Court stated in pertinent part:

> Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – remain immune.

Hall v. Doering, 185 F.R.D. 639, 642-43 (D. Kan. 1999), *quoting Liteky v. United States,* 510 U.S. at 555-56 (1994).

Finally, the District of New Mexico no longer has a Committee on Admissions and Grievances, and it appears that to be a member of the federal bar association, one need only be a member in good standing of the New Mexico bar. If after conducting her *de novo* review of these recommendations the presiding judge arrives at the same or similar conclusions, I therefore respectfully ask that she consider forwarding a copy of her ultimate decision to the New Mexico Disciplinary Board for its consideration.

Wherefore,

IT IS HEREBY RECOMMENDED AS FOLLOWS:

1. Plaintiffs' Motion for Stay of All Further Proceedings *(Doc. 214)* be denied as moot;

2. As to Defendant Fairbanks' motions seeking attorney fees *(Docs. 86 & 87)*, Defendant AHL's motion for order to show cause and contempt *(Doc. 131)*, and Fairbanks' and Wells Fargo's Motion *(Doc. 152)* and AHL's Motion *(Doc. 175)* for Discovery Sanctions be granted, and that an order be entered dismissing the Drains' lawsuit with prejudice as a sanction pursuant to FED. R. CIV. P. 37 for the discovery violations outlined herein;

3. Fairbanks' and Wells Fargo's Motion for Sanctions *(Doc. 117)* pursuant to FED. R. CIV. P. 11 and 28 U.S.C. § 1927 be granted, and that monetary sanctions be imposed against Mr. Bello personally in the amount requested by Defendants in their motion for sanctions; and

4. Plaintiffs' Motion to Quash the Subpoenas *(Doc. 150)* be denied as moot.

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 10 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the ten day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**

/s/ Karen B. Molzen
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES DRAIN and RACHEL DRAIN,

Plaintiffs-Appellants,

v.

ACCREDITED HOME LENDERS INC.; BASMAJIAN T. DOYLE, Director; WELLS FARGO BANK, MINNESOTA, N.A., as Trustee for ITLA Mortgage, Loan Securitization 2002-1, LLC; FAIRBANKS CAPITAL CORP.; UTAH,

Defendants-Appellees.

No. 06-2096
(D.C. No.
CIV-04-399 MV/KBM)

ORDER

Filed May 3, 2007

Before KELLY, ALARCÓN,* and LUCERO, Circuit Judges.

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* The Honorable Arthur L. Alarcón, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER,
Clerk

/s/ [Illegible]
Deputy Clerk